Supreme Court, U.S.
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NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TERM OF OCTOBER, 1997

OFFICER R. E. WILLIAMS AND THE CITY OF ERIE POLICE DEPARTMENT

PETITIONERS

V.

DARRYL BYRD

RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Nos. 96-3306 and 96-3633; judgment entered February 13, 1998, and reconsideration denied March 31, 1998

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

Did the Circuit Court below err in reversing the District Court's grant of Petitioner's Motion for Judgment on the Pleadings, under *Heck v. Humphrey*, given that the subject Respondent's gunshot injury to his foot resulted from a fight with a police officer who was attempting to apprehend Respondent for violent felony and misdemeanor offenses of which he was ultimately and finally convicted, including Resisting Arrest; particularly as the Respondent admits he is attacking the validity of his convictions in this Civil Rights action?

Does the Respondent's complaint name a proper municipal body as a defendant, and properly allege liability for the delay of his medical treatment against any municipal policymaker?

LISTING OF PARTIES

All parties in the Third Circuit below are listed in the case caption, although Petitioner continues to dispute the designation of "Erie Police Department" as a party, rather than the municipality itself, but neither court below specifically ruled on this question.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

LISTING OF PARTIES..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES..... v

CITATIONS..... 1

BASIS OF SUPREME COURT JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the Third Circuit appears to be deciding an important question of federal law in a manner contrary to decisions of this court..... 5

II. Certiorari should be granted because of the lower court's failure or refusal to recognize that Byrd did not sue those he accused of some of his damages, and this Court needs to clarify the pleading standards as to

individual municipal officer defendants..... 15

CONCLUSION..... 19

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

Baldi v. Philadelphia, 609 F. Supp. 162 (E.D. Pa.1985).....15, 16

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979)..... 14

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 7 S.Ct. 1382, (1997)..... 18

BRAWLEY V. PHILADELPHIA SHERIFF'S Department, et al, 872 F.2d 411 (1989)..... 14

Canton v. Harris, 498 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). 18

Commonwealth v. Byrd, 657 A.2d 961 (Pa. Super 1995)..... 9

Crooms v. Mercado, No. 41, 995 F. Supp. 985 (N.D. Ill 1997)..... 8

Duvall, et al v. Borough of Oxford, et al Civ. Action No. 90-0629, 1192 U.S. Dist. LEXIS 3630, in granting in part a Motion to Dismiss under Rule 12 (b) (6).....14, 15

Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976)..... 14

Contents

Page

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).....6, 8, 10, 11

HAMPTON V. HOLMESBURG PRISON OFFICIALS, 546 F.2d 1077 (3d Cir. 1976)..... 14

HECK V. HUMPHREY, 512 U.S. 477, 1114 S. Ct. 2364, 129 L.Ed.2d 383 (1994).....5, 6, 7, 8, 10, 11, 12

LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT, 507 U.S. 163, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993)..... 17

MONELL V. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, (1978)..... 18

MONMOUTH COUNTY CORRECTIONAL INSTITUTIONAL INMATES V. LANZARO, 834 F.2d 326 (3d Cir.1987)..... 14

NELSON V. JASHUREK, 106 F.3d 142 (1997) 6, 11

PEMBAUR V. CINCINNATI, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)..... 18

CONSTITUTIONS:

U.S. CONST. amend. IV..... 2

Contents

Page

Statutes Cited:

28 U.S.C.S. §1254 (1)..... 1

28 U.S.C.S. §1331..... 2

28 U.S.C.S. §1391 (b)..... 3

42 U.S.C. §1983..... 1, 5

18 Pa.C.S.A. §5104..... 6

Rules Cited:

Fed. R. Civ. P. 8..... 17

Fed R. Civ. P. 12(b)(6)..... 15

Fed. R. Civ. P. 12(c).....3, 9

Fed. R. Civ. P. 56..... 10

Treatises:

IA Schwartz et al., Section 1983 Litigation, §1.6 at 21, n.129 and Vol. 1B, §9.33 at 489, n.954 (3d.Ed. 1997) 16, 17

Contents

Page

APPENDIX

Appendix A --Magistrate Judge's Report and Recommendation dated August 24, 1995..... 1a

Appendix B --Order of the District Court dated August 24, 1995.....11a

Appendix C -- Memorandum Order of the District Court dated September 28, 1995.....12a

Appendix D -- Order of the District Court dated April 16, 1996.....14a

Appendix E -- Opinion of the Court for the United States Court of Appeals filed February 13, 1998....16a
STATES COURT OF APPEALS FILED

Appendix F -- Judgment of the United States Court of Appeals for the Third Circuit entered February 13, 1998.....22a

Appendix G -- Sur Petition for Rehearing dated March 31, 1998.....24a

CITATIONS

All determinations below were memorandum decisions not published officially or unofficially.

BASIS OF SUPREME COURT JURISDICTION

The opinion and judgment of the Third Circuit panel was entered February 13, 1998. Respondent himself petitioned for rehearing as to the dismissal of some of his counts, which was denied March 31, 1998. This court's jurisdiction is prescribed by 28 U.S.C.S. §1254(1), enacted June 25, 1948.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The action was filed pursuant to 42 U.S.C.S. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

> an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent Darryl Byrd (hereinafter "Byrd") claims to have been a victim of the use of excessive force by a municipal police officer during an arrest, as determined by reference to the Fourth Amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This action was filed in the Western District of Pennsylvania, Erie Division, at No. 93-CV-152 on April 30, 1993 by Byrd, *pro se* from his prison confinement at the State Correctional Institution at Rockview, Pennsylvania. Jurisdiction existed in that court under 28 U.S.C.S. §1331 as a federal question, with venue

defined by 28 U.S.C.S. §1391(b), as the claim arose within the City of Erie, Pennsylvania. Byrd sought and received *in forma pauperis* status, and ultimately served process February 15, 1994. A Motion to Dismiss under Rule 12(b)(6) was filed by Petitioner March 7, 1994, which resulted in the filing of an Amended Complaint.

Byrd alleges that, on November 25, 1992, he was subjected to excessive force by Petitioner, Officer R. E. Williams of the City of Erie Police. Williams shot Byrd in the foot before arresting him as a suspect in a burglary which had taken place shortly before this encounter. Byrd also claims some amount of beating after the arrest, as well as a delay in being taken for emergency room treatment of his foot wound while he was processed in the police station.

On May 20, 1993, a jury in the Erie County Court of Common Pleas convicted Byrd of burglary, unlawful restraint, theft, terroristic threats, reckless endangerment, aggravated assault and resisting arrest, all arising from his actions on the night of his arrest. According to the official records of the criminal case, in the early morning hours of November 25, 1992, Byrd broke into an apartment, tied up the female occupant, ransacked her belongings, and threatened her with harm. As police arrived at the front door and announced themselves, he broke a window to exit onto the street. During his flight, Byrd came upon Petitioner, R.E. Williams, an on-duty

police officer in plain clothes who had responded to a radio call from the police dispatcher regarding the burglary. Byrd refused to submit to arrest, and in fact fought with Officer Williams, punching him in the head while trying to take his police revolver from him. Byrd broke free, and began to run away from Williams, who, after determining the necessity of force, fired a shot at the lower region of Byrd's body at a distance of twenty to twenty-five feet, hitting him near the ankle of one foot. This slowed Byrd's movement slightly but sufficiently to permit apprehension by Williams and other officers arriving on the scene. Byrd's conviction has twice been affirmed by the Superior Court of Pennsylvania. At this time, no collateral attack on the convictions has drawn them into any doubt. Petitioner answered Byrd's Amended Complaint, raising the affirmative defense of the appropriateness of the force used, and subsequently filed a Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c). Magistrate Judge Susan Paradise Baxter's recommendation to grant the Motion on August 24, 1995, was adopted by Judge Maurice B. Cohill on September 28, 1995, who dismissed the case entirely and closed the record.

Byrd subsequently filed Objections to the Magistrate's Recommendation and Report and, twelve days after Judge Cohill's order, filed a Motion for Stay of Judgment. Six months later, on April 16, 1996, Judge Cohill granted the stay, but in the same order confirmed the previous order dismissing Byrd's case. Byrd then

appealed to the Third Circuit, which docketed the appeal at No. 96-3306. He also filed in the District Court a Motion for Relief From Judgment on April 18, 1996, which Judge Cohill denied October 10, 1996. Byrd then appealed from that denial to the Third Circuit, which docketed it at No. 96-3633, and the court later consolidated both appeals.

Petitioner did attack the timeliness of these appeals, asserting that nothing filed by Byrd after the September 28, 1995, Order dismissing his case properly tolled the 30-day appeal period. The Third Circuit ruled in Byrd's favor, and also reversed part of the District Court's dismissal of the action, allowing Byrd to go forward on his claims of excessive force as to the gunshot and the allegation of unreasonable delay of medical treatment.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the Third Circuit appears to be deciding an important question of federal law in a manner contrary to the decisions of this court.

This case involves an application of this court's decision in *Heck v. Humphrey*, 512 U.S. 477, 1114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994), which established the principle that the Civil Rights Act, specifically 42 U.S.C. §1983, may not be utilized by a person convicted of a crime as a collateral civil attack upon the conviction, when the conviction has not

been reversed or otherwise called into question at the time the civil action is filed. The ruling of the Third Circuit in the present case essentially disregards *Heck* by finding it inapplicable to a manifestly obvious example of the type of collateral civil attack which *Heck* intended to halt.

The Circuit Court's opinion correctly states that the mere conviction of a charge of Resisting Arrest under Pennsylvania law, 18 Pa.C.S.A. §5104, which establishes that the defendant "created a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance" does not preclude a convict from alleging that the force used on him exceeded the proper "substantial" level to that deemed excessive under the Fourth Amendment, as is the standard set by *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed 2d 443 (1989). The Court, however, went on to declare that its own ruling in *Nelson v. Jashurek*, 106 F.3d 142 (1997), controlled this case. *Nelson* involved a section 1983 complaint against a police officer by a person convicted only of resisting arrest, and the Circuit determined that an allegation that the force used was excessive under the circumstances should reach a jury. As will be argued more fully below, the present set of circumstances is materially different from *Nelson* as a matter of law.

Byrd's pleadings admit, both, that he did receive hospital treatment the same

day for his foot wound and that he continues to dispute nearly every factual and legal basis of his conviction. The Third Circuit, nevertheless, allowed Byrd a chance to attack his convictions by litigating his section 1983 claims of excessive force and unreasonable delay in treatment.

In *Heck*, this Court provided an example of the type of section 1983 action which does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's conviction was wrongful. As cited by the Magistrate Judge's opinion, that example involves a plaintiff convicted of resisting arrest who then brings suit claiming violation of his Fourth Amendment right to be free from unreasonable seizures (*Heck*, n. 6, 114 S. Ct. at 2372). The present litigation, of course, fits squarely within this example of a proscribed use of Section 1983.

This petitioner does not suggest that a person convicted of resisting arrest under Pennsylvania law could never bring an excessive force claim under any circumstances; as there indeed might be situations in which the police response to resistance is grossly disproportionate. We state only that such actions, to have any validity, must allege facts far more egregious than those Byrd has alleged; taking into account, as required, all of the circumstances facing the defendant

police officer[1].

In *Crooms v. Mercado, No. 41* 995 F. Supp. 985 (N.D. Ill 1997), the court applied *Heck* to dismiss a section 1983 action arising from a domestic disturbance from which the plaintiff was convicted of resisting arrest, on the basis that, because the plaintiff told a version of his encounter with the police officer which denied the aggressive action of which the jury had convicted him, a civil verdict in his favor would necessarily negate a central element of the criminal offense, as the police officer's version was obviously accepted by the criminal jury. That court also acknowledged the theoretical possibility that a person properly convicted of resisting arrest might still have been the victim of excessive force under the Fourth Amendment, but that the plaintiff in that case could not be permitted a collateral civil jury trial to impeach the version of events already determined against him in a final criminal conviction.

In the present case, Byrd denies his attack upon Officer Williams, and indeed any criminal responsibility whatsoever.

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[1] *Graham v. Connor*, *supra*, 490 U.S. 386 at 396, requires the consideration of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, or whether he is actively resisting arrest or attempting to evade arrest by flight."

He makes numerous attacks on several elements of the sequence of events presented at his criminal trial and accepted by the jury which found him to have committed multiple violent crimes, all prior to his shooting and apprehension. Byrd was sentenced and resentenced after remand to at least 11 years in prison because of these facts as well as his history of similar violent criminality, for which he accepts no responsibility. He has spent the last five years filing one civil action after another against all those who took any part in his arrest, trial and conviction; all of which are replete with his denial of guilt.

Under such circumstances, with the record of his convictions and unsuccessful appeals readily available, and actually the subject of a reported decision of the Pennsylvania Superior Court, the petitioner's Motion to Dismiss under Rule 12(c) was the most efficient and appropriate method to address the legal insufficiency of Byrd's action. The Complaint and Amended Complaint readily admit the fact of the convictions, and the Answer and Defenses simply make further reference to the convictions. The District Court properly confined itself to the pleadings filed, as any additional factual rendition of Byrd's admitted convictions could be gleaned from, or referenced in *Commonwealth v. Byrd*, 657 A.2d 961 (Pa. Super 1995). Byrd's convictions resulting from the November 25, 1992, arrest are undeniable public judicial records, and do not need to be

presented in the manner of depositions, affidavits, documents or other factual material to be considered as part of a determination of a Motion for Judgment on the Pleadings without converting it to a Motion for Summary Judgment under Rule 56. Most of the allegations of Byrd's Complaint and amended complaint are entirely at odds with his convictions. At every stage of the proceedings below, including his Petition for Rehearing to the Third Circuit, he attaches copies of transcripts or correspondence which he deems supportive of his contention that a miscarriage of justice caused his conviction. It is clear that the effort to attack his convictions is the true driving force of Byrd's litigation, not the minor injury and delay of medical treatment he alleges as excessive force.

The brevity of discussion by the Third Circuit panel in reinstating the excessive force and unreasonable delay claims indicates that the Third Circuit sees the viability of excessive force suits under section 1983 by persons convicted of resisting arrest as the *rule* rather than the *exception* contemplated by this Court's ruling in ***Heck***. Indeed, if Darryl Byrd's violent crime spree, including an aggravated assault upon a police officer and flight to avoid apprehension for violent felonies does not prohibit him from claiming his minor arrest injuries as Fourth Amendment violations, then the Third Circuit has dispensed, for most purposes, not only with ***Heck***, but with the primary holding of *Graham v. Connor*, *supra*, which provides

that the issue of the reasonability of the use of force be determined from the perspective of the officer on the scene.

The central focus of *Heck* and *Graham* in dealing with allegations of excessive force during lawful arrests is to recognize the motivation of many convicts to utilize the court system to litigate trivial matters, or to harass those who were responsible for bringing them to justice; and that this sometimes takes the form of a suit for excessive force during or after the arrest. The allegations of the convict's complaint in such a section 1983 action must be placed in their proper context, rather than being permitted in all instances to go to trial under the theory that some criminals who resist arrest indeed are also victims of excessive force by the arresting officers. The Third Circuit, in citing its own decision of *Nelson v. Jashurek*, *supra*, as controlling law regarding the excessive force claim of Byrd displays either an inability or a refusal to distinguish two vastly different events. In *Nelson*, the plaintiff was the subject of an arrest warrant for some type of parole violation; not specified in the opinion, but apparently of insignificant criminality or public danger. Jashurek, a police officer, recognized Nelson, told him he was under arrest, and, after Nelson ran away, caught him and placed him under arrest after a struggle. Nelson, charged and convicted only of resisting arrest, filed suit claiming excessive force by Jashurek under section 1983. The District Court's summary judgment of dismissal

under *Heck* was reversed by the Third Circuit on the basis that a jury could find that the force used by Jashurek was excessive rather than just "substantial."

The Byrd scenario is, of course, drastically different. Officer Williams and the other police were pursuing an unknown suspect who had just committed a nighttime apartment burglary, tied up and threatened the occupant before breaking through the window to run from the police. As determined by the criminal court jury, Byrd attacked Williams, trying to take his police revolver and punching him in the head, again running away, and being caught only after Williams' well-aimed gunshot to Byrd's foot slowed him down. Byrd's complaint denies virtually all of this, and portrays the gunshot as Williams' first action towards him, and himself as wrongfully convicted at trial. If the set of facts determined by the criminal court jury is to be given its proper conclusive presumption of truth, Byrd's account cannot be true, and the appropriateness of Williams' use of non-deadly force must be accepted as a matter of law, lest the entire jurisprudence in this area of law be invalidated.

Perhaps the clearest and most recent proof of Byrd's true intention to relitigate his conviction is his Motion for Reconsideration to the Third Circuit. Unsatisfied with the reinstatement of his claims for excessive force and unreasonable delay of medical treatment, he persists in seeking relief on his theory of intentional use of perjured

testimony; a matter thoroughly outside the scope of section 1983 in the context of an unreversed conviction. He refuses even to admit that his convictions have been substantively affirmed in the state court, and that the resentencing remands have not in any way, shape or form called his convictions into question, but instead argues peripheral issues every time he has filed a document with the courts below.

The totality of the circumstances as well as the prevailing emphasis by Byrd of the alleged wrongfulness of his convictions establishes the manifest error of the Third Circuit's additional reinstatement of Byrd's count alleging "prolonged delay" of medical treatment. While it is surely proper that the courts zealously protect persons held in police custody from deliberate indifference to serious medical needs, it is quite obvious from Byrd's allegations and arguments that the delay of treatment during his processing at the police station was trivial, not just as a matter of civil rights law, but in fact to Byrd himself. He admits that he was taken to the hospital the same morning of his arrest; and identifies no damages flowing from the custodial delay itself, as opposed to the existence of the gunshot wound.

The Circuit Court focusing on Byrd's assertion of a "prolonged interrogation" preceding his transportation to the hospital from the police station found that allegation sufficient, for purposes of resisting a Motion to Dismiss, of the requisite "deliberate indifference to

serious medical needs" which a pretrial detainee must demonstrate to prevail under section 1983: *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), citing *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976). In doing so, the Court both elevated Byrd's allegation above similar claims found insufficient within the same Circuit, and made the more serious error of disregarding Byrd's failure to sue the person or persons he accuses of causing the delay of his treatment!

In *Brawley v. Philadelphia Sheriff's Department, et al*, 872 F.2d 411 (1989), the Circuit let stand, without published opinion, the Eastern District of Pennsylvania's dismissal on summary judgment of such a "deliberate indifference" claim (No. 87-6725, slip op. Dec. 22, 1998), which determined that a twelve-hour wait for treatment of a detainee's knee damaged in a prison bus accident was not a constitutional violation. The District Court's opinion cited *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976), *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) and other cases, holding that the failure to provide prompt medical care alone is not tantamount to a violation of the constitution, and that even with a serious medical condition, the delay must be deliberate and also cause discernible long-term effects itself. Byrd has pled no damages caused by delay alone.

The Eastern District of Pennsylvania again applied these principles in *Duvall*

et al v. Borough of Oxford et al, Civ. Action No. 90-0629, 1192 U.S. Dist. LEXIS 3630, in granting in part a Motion to Dismiss under Rule 12(b)(6). The plaintiff's claim for deliberate indifference to his medical needs resulted from being beaten and slammed into his cell, after which he was heard to be complaining of severe pain. Because the complaint itself admitted that Duvall was taken to the hospital the same day of his arrest, the Court dismissed this count. In the present case, Byrd's complaint also admits his same-day treatment at the hospital.

II. Certiorari should be granted because of the lower court's failure or refusal to recognize that Byrd did not sue those he accused of some of his damages, and this Court needs to clarify the pleading standards as to individual municipal officer defendants.

Even if the gunshot wound to Byrd's foot constituted such a serious medical need that, as a matter of law, no interrogation should have taken place until after immediate medical attention, the *Duvall* opinion also dealt with an aspect of that case which should prove fatal to Byrd's "deliberate indifference" claim. The Court in that case addressed first the improper inclusion of the Oxford Police Department and the Chester County Prison as defendants; dismissing them because they have no separate corporate existence from the Borough of Oxford and Chester County, respectively; citing *Baldi*

v. Philadelphia, 609 F. Supp. 162 (E.D. Pa. 1985). This doctrine, that such departments or governmental sub-units are not "persons" suable under section 1983, is well-established, if not always honored, throughout the nation[2]. Both in the Circuit and in the District Court below, Petitioner raised the argument that Byrd had sued only "Erie Police Department and R. E. Williams, Police Officer" and not the City of Erie itself or a policymaking official. The Magistrate Judge specifically declined to reach the issue, as it was moot with her dismissal. The Circuit failed to deal with the issue at all, though Petitioner briefed it.

The import of Byrd's failure to sue the City of Erie, or to include any policy-making officials in his suit, is that he has failed to sue anyone whom he alleges to be responsible for the decision to delay his medical treatment! He clearly identifies Officer Williams only as the person who shot him in the foot and testified against him, but just as clearly describes in his complaint his transport and detention by other officers, with Williams no longer having control of his transportation and detention. He has, therefore, not stated any recognizable claim for the deliberate indifference to his medical needs. Such a claim requires

[2] Martin A. Schwartz and John E. Kirklin, Section 1983 Litigation Claims and Defenses Third Edition, John Wiley and Sons, Publishers, ISBN 0-471-11761-7, Sec. 5.2, notes 43-44.

at least the proper inclusion of the City of Erie as a defendant, even under the liberal federal pleading standards applicable as to section 1983 municipal defendants under *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed 2d 517 (1993).

Leatherman, of course, rejected any heightened pleading standard in section 1983 actions as to municipal entity defendants, but left explicitly undecided the issue of whether the availability of qualified immunity as a defense for individual governmental officers would support a requirement to plead section 1983 claims with more specificity than generally required under Fed. R. Civ. P. 8. The various decisions of the lower federal courts have differed significantly about the effect of *Leatherman* on claims against individual defendants: *Section 1983 Litigation, Claims and Defenses supra*, 1.6, note 129; 9.33, note 954.

The present case is as good an opportunity as any for this Court to settle the issue left undecided by *Leatherman*. The Complaint and Amended Complaint filed by Byrd clearly have failed to sue a proper municipal defendant, and have identified only an individual officer who is not alleged to have been responsible for deliberate indifference to Byrd's medical needs after the arrest. If such a delay of medical treatment giving rise to a claim of deliberate indifference did take place, the only responsible parties would be

those individuals acting under color of law, and not entitled to immunity. Byrd has named none of them. Even if he had properly sued the City of Erie, rather than its non-suable Police Department, he would have no basis to impose municipal liability unless a policymaking official took a specific unconstitutional action against him, or if the non-policymakers acted pursuant to municipal policy, custom or practice. This cannot be established, or even alleged, by vague, general assertions against persons not even alleged to have policymaking power. The requirements for a proper allegation of municipal liability for a single constitutional deprivation by a policymaker, as set forth by this court in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d 452 (1986); or an allegation of municipal liability because of a deliberate indifference or failure to train, determined in *Canton v. Harris*, 498 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989) and *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382, (1997), are not remotely complied with in this matter, even allowing a certain indulgence to *pro se* prisoner pleadings.

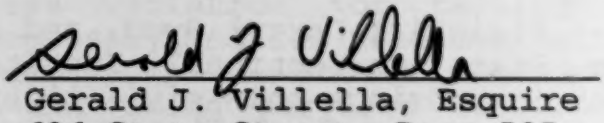
The Third Circuit, as well as some other Circuits, apparently require additional direction from this Court regarding such matters as the use of section 1983 by convicts for collateral civil attacks upon their convictions.

Furthermore, there are many plaintiffs who appear to believe that municipalities, or even municipal sub-units, can generally be held liable for any allegedly unconstitutional actions taken by any of their employees at any level with the barest and most conclusory allegations set forth in a complaint. This Court has said otherwise in the recent past, and is entitled to have its rulings adhered to by the lower tribunals. The nation is entitled to have section 1983 of the Civil Rights Act preserved as a proper vehicle for redress of serious wrongs, and not be further abused.

CONCLUSION

Petitioner request that a Writ of Certiorari be issued to the Third Circuit Court of Appeals, requiring the reinstatement of the District Court's dismissal of the action.

Respectfully Submitted,



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Dated: June 25, 1998

APPENDIX A -- MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED AUGUST 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
	:	
v.	:	
	:	
ERIE CITY POLICE	:	Civil Action
DEPARTMENT,	:	No. 93-152
Defendants	:	Erie

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.
RECOMMENDATION

It is recommended that Defendants' Motion for Judgment on the Pleadings be granted.

II.
REPORT

Plaintiff Darryl Byrd, and inmate at the State Correctional Institution at Rockview, brings this civil rights action against the Erie Police Department and Officer R. E. Williams. Plaintiff claims that he was returning from the grocery store on November 25, 1992, when he was shot from behind in the leg by Defendant Williams. Fearing for his life, Plaintiff claims that he ran from the scene, but was quickly apprehended by the police, beaten by Defendant Williams and other police officers, and arrested. He also claims

that he was deprived necessary medical treatment for his injuries.

Defendants, on the other hand, claim that Plaintiff was identified by the victim and another witness as having just run from the scene of a burglary and attempted rape. Officer Williams, responding to a radio call describing Byrd as a possible suspect, encountered Plaintiff and the two men struggled. Plaintiff was able to get free, so Defendant Williams shot him in the ankle as he was running away to enable the police to apprehend him. Plaintiff was convicted in the Court of Common Pleas of Erie County of unlawful restraint, burglary, aggravated assault, resisting arrest and reckless endangerment.

Plaintiff brings four causes of action in his civil rights complaint: (1) a due process violation for use of excessive force during his arrest; (2) a due process violation for failing to provide necessary medical treatment after his arrest; (3) a Fourth Amendment violation for using perjured testimony, and the charge of aggravated assault, in order to obtain a conviction; and (40 violations of the First, Fourth and Eighth Amendments for conspiring with the Erie Daily Times to print, among other things, the charges against him prior to conviction.

Appendix A

COUNTS I and II

The first and third causes of action may be reviewed together as they are both governed by the Supreme Court ruling in Heck v. Humphrey, _____ U.S. _____, 114 S.Ct. 2364 (1994). Because Plaintiff's claims in these counts are based upon the legality of the underlying conviction, no civil rights claim has accrued as to them. Id. Therefore, these counts must be dismissed as not stating claims upon which relief may be granted.

In Heck, the Supreme Court held that there is no section 1983 claim for an "allegedly unconstitutional conviction or imprisonment, or for other harm cause by actions whose unlawfulness would render a conviction or sentence invalid" until that underlying conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck, 114 S.Ct. at 2364, 2372.

Therefore, when confronted with a civil rights claim challenging the events leading up to a conviction, this Court must first decide "whether judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Id. at 2372. if not, the case may proceed. If so, the case must be dismissed "unless the plaintiff can show

that the conviction or sentence has already been invalidated." Id.

With regard to direct allegations of unconstitutional convictions, the Supreme Court reasoned that such claims were analogous to the tort of malicious prosecution, which requires a showing that a prior criminal proceeding has been terminated in favor of the accused for recovery. Id. at 2373. As to the "other harm" referred to by the Court, it gives the following example:

> "An example of this latter category--a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful--would be the following: A state defendant is convicted of and sentences for the crime of resisting arrest....He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted....[T]he § 1983 action will not lie."

Id. at n.6. Plaintiff's claims in his first and third causes of action fit squarely within this Supreme Court ruling.

Plaintiff's first cause of action is a due process claim for use of excessive force in his arrest. Because he was convicted of the crime of resisting arrest in state court, his claim here is precisely that described by the Supreme Court in the quoted material above as one that will not lie until the underlying conviction is reversed or called into question. This claim, having not accrued, must be dismissed.

Likewise, Plaintiff's third cause of action does not survive a Heck analysis. in that count, Plaintiff claims that his constitutional rights were violated because (1) perjured testimony was used to obtain the conviction against him, and (2) stories were fabricated to bring an aggravated assault charge against him in order to "cover" for the excessive force used at the time of his arrest. These allegations strike directly at the underlying convictions, which have not been reversed on appeal or called into question in any way by the state courts.

The Supreme Court's decision in Heck affects only plaintiff's request for damages on these two counts. Nonetheless, insofar as Plaintiff seeks injunctive or declaratory relief based on these claims, the action is properly construed as a habeas corpus petition, which requires

that plaintiff exhaust his state remedies.

Count II

Plaintiff claims in his second cause of action that Defendants failed or refused to provide necessary medical treatment to him following his arrest. Because there had been no formal; adjudication of guilt at the time of the required medical care, the eighth amendment to the United States Constitution has no application. The Due Process Clause, however, does require the responsible government agency to provide medical care to persons, such as Plaintiff, who have been injured while being apprehended by police.

The Supreme Court has stated that these due process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983). In this Circuit, a pretrial detainee must demonstrate that a defendant showed deliberate indifference to his serious medical needs. Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988).

A serious medical need is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Monmouth County Correction

institute inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988). A serious medical need may also be found to exist where the denial or delay of treatment results in "unnecessary and wanton infliction of pain." Id. at 347.

As to what constitutes deliberate indifference, a denial of a reasonable request for medical treatment, and intentional refusal to provide known needed medical care, and a purposeful delay in providing this care have all been held to constitute deliberate indifference. Id. at 346.

In certain allegations of Plaintiff's original complaint, which are incorporated by reference in his amended complaint, he alleges that he was shot by defendant Williams and beaten. He alleges that he was then taken to the police station and interrogated, and that after "prolonged interrogation,' he was taken to Saint Vincent Health Center for medical treatment. Although he makes no specific allegation of injury due to a delay in receiving medical treatment, he complains that a number of items that caused him distress resulted from "the incident that occurred on November 25th, 1992." These complaints range from high blood pressure, sleeplessness and nervousness to stress attacks and rapid pulse; but, the only complaint listed that could possible be connected to any delay in the delivery of

medical treatment is his claim of a "swollen ankle."

In his amended complaint, Plaintiff again alleges that he was shot by Defendant Williams, but here he adds that he was beaten on the head and back of the legs with clubs by the police. He complains that he suffered unspecified physical injuries and mental anguish. He makes no other specific allegations regarding his medical treatment.

These allegations sufficiently state a serious medical need in that a lay person could identify that a gun shot wound should be treated by a medical professional. However, no stretch of these claims, reviewing the allegations in Plaintiff's favor and with the understanding that he is before this Court pro se, alleges a constitutional injury because of a delay in providing medical care:

> "To establish a constitutional violation, the indifference must be deliberate and the actions intentional. Moreover, not every injury or illness invokes the constitutional protection -- only those that are "serious" have that effect."

Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081 (3d Cir. 1976). Plaintiff makes no allegations of a

serious injury due specifically to the fact that medical care was delayed, and no allegation that Defendants intentionally ignored his medical needs. In fact, Plaintiff's allegation of a "prolonged interrogation" may not even be adequate to state a claim of delay. See, e.g., Brawley v. Philadelphia Sheriff's Department, No. 87-6725, slip op. (E.D.Pa. December 22, 1988), aff'd 872 F.2d 411 (3d Cir. 1989) (no constitutional violation when pretrial detainee waited nearly 12 hours for medical care).

Plaintiff's allegations do not state a claim under the civil rights law for the violation of his due process rights for depriving or delaying medical treatment, and should be dismissed.

Count IV

In his fourth cause of action, Plaintiff alleges that the Defendants conspired with the Erie Daily Times to print incorrect facts regarding his case before due process of law was given. This does not state a claim under the civil rights law as no constitutional or federal law violation may be made out by these allegations, even if they are proven true at trial.

Finally, Defendants make an argument for dismissal of the complaint as to the Erie Police Department, claiming that it cannot be sued directly. Because of the recommended disposition of the counts of

the complaint discussed above, this argument need not be address by the Court.

In accordance with the Magistrates Act, 28 U.S.C. §636(b((1) (B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to the report and recommendation.

/S/Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: August 24, 1995

APPENDIX B -- ORDER OF THE DISTRICT COURT DATED AUGUST 24, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD, Plaintiff	:	
v.	:	
ERIE CITY POLICE DEPARTMENT, Defendants	:	Civil Action No. 93-152 Erie

ORDER

AND NOW, this 24th day of August, 1995, upon consideration of Plaintiff's Motion for an Order Compelling Discovery (Doc. #21) and Defendants' response thereto, and in light of the Magistrate Judge's Report and Recommendation filed this date, it is hereby

ORDERED that Plaintiff's motion is **DENIED**, without prejudice.

/S/Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

cc: all parties of record (lw)

APPENDIX C -- MEMORANDUM ORDER OF THE DISTRICT COURT DATED SEPTEMBER 28, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
v.	:	**C.A. No. 93-152 Erie**
	:	
ERIE POLICE DEPARTMENT, et al,	:	
Defendants	:	

MEMORANDUM ORDER

Plaintiff's civil rights complaint was received by the Clerk of Court on April 30, 1993, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on August 24, 1995, recommended that judgment on the pleadings be granted for Defendants. The parties were allowed ten (10) days from the date of service to file objections. An extension of time to file objections was granted to Plaintiff. Service was made on Plaintiff by delivery to SCI Rockview, where he is incarcerated, and on Defendants. No objections were filed. After de novo review of the pleadings and

documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 28th day of September, 1995; **IT IS HEREBY ORDERED** that Defendant's Motion for judgment on the Pleadings is **GRANTED**. Judgment is entered in favor of Defendants and against Plaintiff.

The report and recommendation of Magistrate Judge Susan Paradise Baxter, dated August 24, 1995, is adopted as the opinion of the Court.

/S/Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
United States Dist. Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge

all parties of record /s/ rw

APPENDIX D -- ORDER OF THE DISTRICT COURT DATED APRIL 16, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
	:	
v.	:	**C.A. No. 93-152E**
	:	
CITY OF ERIE POLICE	:	
DEPT., et al.,	:	
Defendants	:	

ORDER

AND NOW, to-wit, this 16th day of April, 1996, this Court having received petitioner Darryl Byrd's Motion for Stay of Judgment (Doc. 39) requesting that we review his objections to the magistrate judge's report and recommendation in this action, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that said motion be and hereby is **GRANTED**.

Appendix D

Upon consideration of petitioner's objections IT IS FURTHER ORDERED that our Order dated September 28, 1995 (doc. 37), adopting the report and recommendations of the magistrate judge, shall stand.

/S/Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
District Judge

cc: Counsel of Record

Darryl Byrd
SCI Rockview
Box A
Bellefonte, PA 16823

APPENDIX E -- OPINION OF THE COURT OF THE UNITED STATES COURT OF APPEALS FILED FEBRUARY 13, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 AND 96-3633

DARRYL BYRD
Appellant

v.

CITY OF ERIE POLICE DEPT;
R.E. WILLIAMS, Police Officer

On Appeal From the United States District Court For the Western District of Pennsylvania (D.C. Civil Action No. 93-CV-00152E) District Judge: Honorable Maurice B. Cohill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a) December 1, 1997

BEFORE: STAPLETON, COWEN and LEWIS, Circuit Judges

(Opinion Filed February 13, 1998)

OPINION OF THE COURT

Appendix E

STAPLETON, Circuit Judge:

Appellant Darryl Byrd was convicted of unlawful restraint, burglary, aggravated assault, resisting arrest and reckless endangerment. He subsequently filed this civil rights case in which he alleged that the Erie Police Department shot him in the ankle without provocation and then beat him.[1] Byrd advance claims for excessive force, failure to provide necessary post-arrest medical treatment, use of perjured testimony to obtain a conviction, and an unconstitutional conspiracy between the police and an Erie newspaper to publish the charges against him prior to his conviction.

Defendants moved for judgment on the pleadings, which the magistrate judge recommended granting. Byrd, who was and is currently incarcerated, sought and received an extension of time until September 26, 1995, to file objections to the Report. When he did not file timely objections, the district court granted the motion for judgment on the pleadings by order entered September 29, 1995. Byrd's objections were received the next day.

On October 10, 1995, the district court received Byrd's motion for "stay of

---

[1] Defendants contend that Byrd was fleeing the scene of a robbery and rape and that he had escaped from the police moments earlier.

judgment." By order entered April 18, 1996, the district court granted the motion for stay of judgment, denied Byrd's objections, and stood by its previous order granting defendants' motion for judgment on the pleadings. Byrd filed a notice of appeal on May 17, 1996. Appellees have filed a motion to dismiss the appeal as untimely.

I.

Byrd's motion to stay the judgment is properly considered as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), or as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Because it was filed within ten days of the entry of the order granting judgment on the pleadings, it tolled the time period for taking the appeal. Fed. R. App. P. 4(a)(4)(E) and (F). Counting from the date of entry of the order denying this post-judgment motion, Byrd's notice of appeal was filed on the 29th day, May 17, 1996, and is therefore timely. Fed. R. App. P. 4(a)(1).

II. The Excessive Force Claim

The magistrate judge found that Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), disposed of Byrd's excessive force and perjured testimony claims. In Heck, the Supreme Court held that "a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or

sentence has been invalidated." 512 U.S. at 489-90. A district court must dismiss such an action where a successful judgment under §1983 would "necessarily imply the invalidity of [the] conviction." Id. at 487. The magistrate judge found that Byrd's claims regarding his apprehension and arrest attacked actions whose unlawfulness would necessarily render his convictions invalid. This conclusion is inconsistent with our subsequent decision in Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997). Accordingly, the judgment of the district court must be reversed and this case must be remanded to the district court for further proceedings on the excessive force claim consistent with our decision in that case.

III.

We agree with the district court that Byrd's perjured testimony claim is barred by Heck.

IV.

The district court dismissed Byrd's conspiracy claim on the ground that it failed to state a claim under federal law. We agree.

V.

Byrd alleges that, after being shot in the ankle and beaten on the head with clubs, he was taken to the police station and subjected to "prolonged interrogation"

before being taken to the hospital for medical treatment. The district court acknowledged that Byrd's "allegations sufficiently state a serious medical need in that a lay person could identify that a gun shot wound should be treated by a medical professional." It nevertheless dismissed this claim because Byrd "makes no allegation of a serious injury due specifically to the fact that medical care was delayed, and no allegation that Defendants intentionally ignored his medical need."

Assuming, as we must for present purposes, that truth of the allegations that Byrd had a gun shot wound and that the interrogation was prolonged, we cannot say Byrd will be unable to prove a set of facts consistent with his complaint on which relief could be granted. Conly v. Gibson, 355 U.S. 41, 45-46 (1957). There was a serious medical need of which a lay person would necessarily have been aware and if there was a prolonged delay in meeting that need for the purpose of interrogation, we believe a fact finder could infer deliberate indifference.[2]

---

[2] The seriousness of any injury specifically attributable to the delay in receiving medical attention will be relevant to the amount of damage to which Byrd may be entitled, but the absence of an allegation of serious injury from the delay is not fatal in a Rule 12(b)(6) context.

VI.

The judgment of the district court will be reversed, and this case will be remanded for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing not-for-publication opinion.

/S/ Judge Stapleton
Circuit Judge

APPENDIX F -- JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED FEBRUARY 13, 1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3306 & 96-3633

DARRYL BYRD,
Appellant

v.

CITY OF ERIE POLICE DEPT;
R.E. WILLIAMS, Police Officer

Appeal from the United States District Court for the Western District of Pennsylvania
D.C. No.: 93-cv-00152E
District Judge:
The Honorable Maurice B. Cohill, Jr.

Before: Stapleton, Cowen and Lewis,
Circuit Judges

JUDGMENT

Appendix F

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Cir. LAR 34.1(a) December 1, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 16, 1996 and October 10, 1996, be, and the same are hereby reversed and the cause remanded to the said district court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST: /S/ P. Douglas Sisk
Clerk

Dated: Feb. 13. 1998

APPENDIX G -- SUR PETITION FOR REHEARING DATED MARCH 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 and 96-3633

DARRYL BYRD
Appellant

v.

CITY OF ERIE POLICE DEPT.;
R.E. WILLIAMS, Police Officer

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/S/ Judge Stapleton
Circuit Judge

DATED: March 31, 1998

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
OCT 7 1998
CLERK

IN THE SUPREME CCURT OF THE UNITED STATES

TERM OF OCTOBER, 1998

No. 98-162

RESPONSE REQUESTED

DARRYL BYRD
Petitioner.

Vs.

OFFICER ROBERT E. WILLIAMS AND THE CITY OF ERIE POLICE DEPARTMENT
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Nos. 96-3306 and 96-3633;Judgment entered February 13, 1998, and reconsideration denied March 31, 1998.

Petition for Writ of Certiorari
Opposition

Darryl Byrd, DS-9046
Box A.
Bellefonte, Pa. 16823-0820
SCI-Rockview

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, DARRYL BYRD, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ✓ No ___

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

41¢ hour

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ✓ No ___

a. If the answer is yes, state the total value of the items owned. $ 0.00¢

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None Due to being in prison

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: _____, 19___.

Darryl Byrd
(Signature)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DARRYL BYRD
Petitioner
vs.

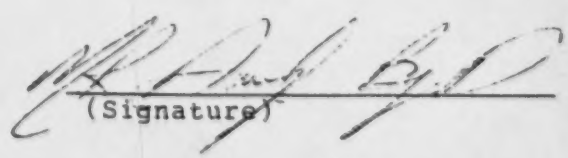
OFFICER ROBERT E. WILLIAMS AND THE CITY OF ERIE POLICE DEPARTMENT
Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS THE PETITIONER ASKS LEAVE TO FILE THE ATTACHED PETITION FOR A WRIT OF CERTIORARI WITHOUT PREPAYMENT OF COSTS AND TO PROCEED IN FORMA PAUPERIS.

(✓) PETITIONER HAS PREVIOULY BEEN GRANTED LEAVE TO PROCEED IN FORMA PAUPERIS IN ANY OTHER COURT.

(.) PETITIONER HAS NOT PREVIOUSLY BEEN GRANTED LEAVE TO PROCEED IN FORMA PAUPERIS IN ANY OTHER COURT.

PETITIONER'S AFFIDAVIT OR DECLARATION IN SUPPORT OF THIS MOTION IS ATTACHED HERETO.



(Signature)

TABLE OF CONTENTS PAGE

TABLE OF AUTHORITIES..... i,ii

SUPREME COURT JURISDICTION..... iii

QUESTIONS PRESENTED FOR REVIEW..... iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... v

STATEMENT OF THE CASE..... 1

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT ERR IN REVERSING THE DISTRICT COURT'S GRANT OF PETITIONER'S MOTION FOR JUDGMENT OR PLEADINGS, BECAUSE THE MAGISTRATE JUDGE DID NOT CONSIDER ANY BASIS FOR GRANTING THE MOTION OTHER THAN AN APPLICATION OF HECK V. HUMPHREY PARTICULARTLY AS GENUINE DISPUTES OF MATERIAL FACT MAY HAVE EXISTED WITH RESPECT TO THAT DEFENSE..... 2

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURT DID NOT FAIL OR REFUSAL TO RECOGNIZE THAT BYRD DID NOT SUE THOSE HE ACCUSED OF HIS DAMAGES, BUT THE CENTRAL QUESTION PRESENTED HERE IS WHETHER THAT RULES APPLIES TO A SINGLE ACT THAT ITSELF NEITHER VIOLATES NOR COMMANDS A VIOLATION OF FEDERAL LAW..... 11

CONCLUSION..... 15

APPENDIX..... A-H

CASES (cont.):

STATUTES:	PAGES
42 U.S.C. § 1983	v,1,2,3,7,11,12,13
28 U.S.C.S. § 1331	1
28 U.S.C.S. § 1343(3)	1
28 U.S.C.S. § 1391(b)	1
18 Pa.C.S.A. § 5104	6
RULES:	
Fed.R.Civ.P. 12(b)(6)	1
Fed.R.Civ.P. 12(c)	1
AUTHORIZED KING JAMES VERSION:	
Ecclesiaster Chapter 3 verse 1 and 5	14,15
Sur Petition for Rehearing Dated March 31, 1998	A2
Judgment & Opinion of the United States Court of Appeals for the Third Circuit Entered and filed February 13, 1998	B2
Order of the District Court Dated April 16, 1996	C2
Memorandum Order of the District Court Dated September 28, 1995	D2
Erie County Common Pleas Court Notes of Testimony of Trial Dated May 18,19,20, 1993	E2
Order of the District Court & Magistrate Dated August 24, 1995 Report & Recommendation	F2
Officer Robert E. Williams Out Patient/ER Record Dated November 25, 1992	G2
District Justice A.Joseph, Weindorf Probable Cause Search Warrant G 16174 By Det.Sgt. Dominick Dipaolo Dated November 25, 1992	H2

TABLE OF AUTHORITIES

CASES:	PAGES
Baker v. McCollan, 443 U.S. 137, 144, N.3, 99 S.Ct. 2689,2694 N.3, 61 L.Ed.2d 433 (1979)	3
Board of County Commissioners of Bryan County,Oklahoma v. Brown, 117 S.Ct. 1394 (1997)	11
Carter v. Carlson, 447 F.2d 361 (1971)	13
Commonwealth v. Byrd, 657 A.2d 961 (Pa.Super. 1995)	3
Garner v. Memphis Police Dept., 710 F.2d 248-249 (1983)	13
Giglio v. United States, 405 U.S. 150 92 S.Ct. 766 (1972)	10
Grahman v. Connor, 490 U.S. 396 109 S.Ct. 1870-71 (1989)	3
Heck v. Humphrey, 512 U.S. 477, 1114 S.Ct. 2364, 129 L.Ed2d 383 (1994)	2
Jenkins v. Averett, 424 F.2d 1232-33 (1970)	13
Monell v. New York City Dept. of Social Services, 436 U.S. 694, 98 S.Ct 2037, 2083 56 L.Ed.2d 611, (1978)	12
Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)	3
Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 3 L.Ed.2d 1217 (1959)	2
Newport v. Fact Concerts, Inc., 453 U.S. 247 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)	11
Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed 2d 673 (1988)	11,13
Pembaur v. Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed2d 452 (1989)	11
Roberts v. Williams, 456 F.2d 828 (1972)	13
Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1699-01 (1985)	12
United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637 (1973)	13
CONSTITUTIONS:	
U.S. Const. Amend. IV	**v,7**
U.S. Const. Amend. XIV	**v.2.3**
STATUTES:	
28 U.S.C.S. § 1254(1)	**iii**

SUPREME COURT JURISDICTION

The Opinion and Judgment of the Third Circuit Penel was entered February 13, 1998.

Petitioner's Petition for Rehearing, which was dismiss on March 31, 1998.

This Court's Jurisdiction is prescribed by 28 U.S.C.S. 1254(1), enacted June 25, 1948.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in reversing the District Court's grant of petitioner's Motion for Judgment or the Pleadings, because the Magistrate Judge did not consider any basis for granting the motion other than an Application of Heck v. Humphrey, particularly as genuine disputes of Material facts may have existed with respect to that defense?

Does the Petitioner's Pro se Complaint name a proper Municipal body as a defendant, and properly allege liability for the delay of his Medical Treatment against any Municipal Policymaker?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The action was filed pursuant to 42 U.S.C.S. 1983, which provides:

> Every person who, under color of any statute, ordinace, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioner Darryl Byrd not only claims to have been a victim of the use of excessive force by a Municipal Police Officer during an Arrest, as determined by reference to the Fourth Amendment to the Constitution, but that he was convicted based upon Perjury testimony in a Court of Law.

The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon Probable Cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No State shall make or enfore any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. Fourteenth Amendment of 1868.

STATEMENT OF THE CASE

On April 30, 1993, Darryl Byrd filed an Pro se Civil Rights Act of 1871 42 U.S.C. § 1983. Jurisdiction was under 28 U.S.C.S. § 1331 & 1343(3), as a federal question, with venue defined by 28 U.S.C.S. §1391(b), Complaining that Respondent's City of Erie Police Department and Officer Robert E. Williams, shot Mr.Byrd in the right ankle on November 25, 1992, while Mr.Byrd was walking down the street in the City of Erie, coming from the local store.

Mr. Byrd alleged that after Officer Williams shot him and assaulted him several other Erie Police Officers did the same thing .

On May 20, 1993, Mr.Byrd was convicted of a one Burglary, and Acquitted, of another. After that Petitioner was sentence to an aggregate term of 11½ to 23 years of imprisonment. Petitioner Appeal Conviction.

On September 19, 1993, Mr.Byrd filed an Amended Complaint alleges that Erie County Police Department Deprived Mr.Byrd necessary Medical Treatment, once he was in custody of the entire Police Department.

On March 7, 1994, the respondent's Motion to Dismiss complaint under F.R.C.P. 12(b)(6) to the District Court.

On March 29, 1994, U.S. Magistrate Judge M.H. Kelley, filed Report and Recommendation denying the respondent's Motion and Granted Petitioner's Motion to Amend his Complaint.

On April 5, 1994, the Superior Court of Pensylvania Vacated and Remand Petitioner case back to the Lower Court.

On June 16, 1994, the respondent's Motion for Judgment on the Pleading under Fed.R.Civ.P. 12(c)

On April 11, 1995, the Superior Court of Pennsylvania Vacated and Remand Petitioner case back to the Lower Court.

On August 24, 1995, U.S. Magistrate Judge Susan P. Baxter granted the

respondents pleadings.

On September 28, 1995, U.S. District Judge Maurice B. CoHill, adopted the Report & Recommendation as the opinion of the Court.

On April 4, 1996, Petitioner Motion for stay, requesting a review of his objections to the Magistrate Judge's Report & Recommendation.

On April 16, 1996, U.S. District Judge CoHill Granted, Petitioner Motion for stay, but still adopting the Report & recommendations of the Magistrate.

On October 10, 1996, U.S. District Judge CoHill, Jr., Odered that Petitioner's Motion for relief from Judgment Denied.

On May 17, 1996, Petitioner appeal to the Court of Appeals.

On February 13, 1998, Court Appeals Reversed and Remanded the Judgment of the District Court for further Proceedings on the Excessive Force claim, but agree with the District Court that Byrd's Perjury Testimony claim is barred by Heck and Byrd Conspiracy claim failed to state a claim under Federal Law. Petitioner Appeal.

On March 31, 1998, the Court of Appeals denied the Reargument. Sur Petition for Rehearing.

ARGUMENT

I. Certiorari should be granted because the Third Circuit err in reversing the District Court's grant of petitioner's motion for Judgment or Pleadings, because the Magistrate Judge did not consider any basis for granting the motion other than an Application of Heck v. Humphrey, particularly as Genuine Disputes of Material fact may have existed with respect to that defense.

This case involves an application of this Court's decision in Napue v. - Illinois, 360 U.S. 264, 79 S.Ct. 1173 3 L.Ed.2d 1217 (1959), the Court states:

> ***(I)t is established that a conviction obtained through use of false evidence, know to be such by representatives of the state must fall under the Fourtheenth Amendment. The same result obtain s when the state, although not soliciting false evidence allows it to go uncorrected when it appears".

To established the Principle that the Civil Rights Act, specifically 42 U.S.C. § 1983 may be utilized by the challenged application of force is

this Court's decision in Graham v. Connor, 490 U.S. 396 109 S.Ct. 1870-71 (1989), the Court states:

> "Validity of excessive force claims brought under § 1983 is not governed by single generic standard; rather, court must identify specific constitutional right allegedly infringed, and then Judge the claim by reference to specific Constitutional Standard which governs that right. See also, Baker v. McCollan, 443 U.S. 137, 144, N.3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979)".

Petitioner filed Supplement Brief's on April 5 and April 11 of 1994 and 1995, claiming actual innocence, based upon a conviction obtained through the use of false evidence and knowingly used of perjured testimony by the Prosecution. No other Appionted Attorney by the trial Court would not attacked the criminal conviction for petitioner, when petitioner was telling the trial court that there was testimony that went uncorrected by the Prosecution.

Since this Court decision in Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), it has been firmly established that the Prosecution 's knowing use of perjured testimony, or of fabricated evidence, as well as its failure to take remedial measures to mitigate the damaging effects of such testimony and evidence, violates the Fourteenth Amendment's Due Process Clause.

In the closing arguments before the Jurors in Commonwealth v. Darryl Byrd, the Prosecution told them that "Mr.Byrd was approehended almost immediately after being shot. There's absolutely no way on either that anyone could conconclude from the evidence presented in this trial that the Zanni incident occurred after Mr.Byrd was shot. That is just not physically possible from the evidence you've heard. And you have to base decisions on evidence. You can't speculate", Page 28-29.

The Prosecution's closing argument might have been true, accept that Officer Williams told the Jurors that:

Trial
Vogel to Officer Williams Page 55

Q. Okay. And, once again, if you could, for the benefit of the jury, where did you decide to do that Officer Williams?
A. There's serveral reasons. What we were with the information we had he was involved in an in a violent felony, the attempted rape. He had been it's alleged that he had broken into a second house during his flight to escape that where he was going, it was very likely, you know, he would get lost in the area because he alluded police once already. The area he was going to is a very heavy concentration of apartments, mostly Gannon Students, especially a lot of young females in the area. I was very concerned if we lost him and he force his way into one of those houses, we could have a situation where you know,somebody would be hurt.
Q. And for all of these reasons you decided to fire at him?
A. Yes, Sir.

In this case, Officer Williams forgot to claim two thing that he told the Jurors, that one Petitioner ran directly at him and that he try to take possession of his 9mm hand gun.

Trial
Vogel to Officer Williams Page 51-52-53 -

Q. Okay. What's the next thing that happens?
A. At this point I had my weapon drawn. I had my gun in my right hand and my flashlight in my left hand. As he's coming towards me and getting closer, I yelled that I was police, freeze.
Q. How far away would you say Mr.Byrd was from you when you first yelled, "Police, freeze"?
A. It's difficult to say, probably 20 feet. It's difficult to estimate that.
Q. And did he respond in any?
A. He continued to run directly at me.
Q. What did he do physically?
A. At that point we were in physical contact. He grabbed my hands. I don't know how I lost my flashlight but he grabbed hold of my gun and was attempting to pull it away.
Q. And could you tell, did he have one hand or both of his hands on your gun?
A. At one point he had both hands. It was a lot of movement of hands at that time. It was back and forth.
Q. Could you tell from the feel of it, it was a closed fist or open hand?
A. It seemed like a closed fist. He got me right in the area below the nose on the upper lip, right in the center of the face area.
Q. What happened after he struck you?
A. At that point it caused my eyes to start watering. He broke way. I was trying, hopefully, to get him down. He broke away and he was able to start running north on Mrytle street again.

The Prosecution never enter into evidence Officer Williams 9mm hand gun to show to the Jurors that Officer Williams was not lying about Petitioner trying to take his 9mm Ruger hand gun away from this Officer. In fact, the Prosecution used the Expert Testimony of Forensic Serologist Bruce Kevin

Tackett who told the trial Court and Jurors that:

Trial
Vogel to Forensic Page 128

Q. Then you talked about doing the enzyme tyings. Are you able to do that with all the blood stains?
A. In addition, there was only a small amount of blood present on the Ruger 9mm. Hand gun. I was only able to determine it was type O human blood. Again, there was insufficient quantities of blood on this gun to do enzyme tying.

But at trial Officer Williams told the Trial Court and the Jurors that Petitioner Possess his Ruger 9mm hand gun and Officers Kuhn, Howe and James Rouse claim under Oath that they saw the same thing:

Trial
Vogel to Officer Williams Page 60

Q. Did you have any further involvement in the arrest or processing of Mr.Byrd that evening?
A. No. At that point Sergeant Robarts cleared my weapon, checked it out and said, "Put it in your holster and leave it there". I did that. Sergeant Robarts, myself, and I don't know what other officer it was, we left that area and went back onto Myrtle to find where my flash-light and clip had gone.

The Trial Judge and Prosecution had the chance to correct Soliciting False Evidence and Manufacturing Evidence. Officer Williams never told his Supervisor Roberts that Mr.Byrd grabb his Ruger 9mm hand gun and that there was blood on this Weapon by Mr.Byrd. Instead, Officer Williams tells the Court and the Jurors that his Supervisor Order Williams to leave his 9mm in his holster. The only evidence enter-into by the Prosecution was Officer Williams Sea Hawk's Cap, which only suggest to the Jurors that Mr.Byrd blood was on this Cap. It should be believe that had Officer Williams told his Supervisor that Br.Byrd grabb his Ruger 9mm hand gun and there was blood on it from the struggle, the Supervisor would have put the Officer Ruger 9mm hand gun in a plastic Container or bag. But there was not testimony from Officer Robarts.

Again, Officer Williams tells the Trial Court and the Jurors that:

Trial/Cross
Mogre to Officer Wiilaims Page 67

Q. Officer, If I told you that the Medical Reports indicated that you received treatment for a quarter centimeter abrasion on your left

index finder, would that be consistent with what you recall?
A. Yes, Sir.

Under Pennsylvania Law a person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a Substantial risk of bodily injury to the public servant or any one else, or employs means justifying or requiring substantial Force to over come the resistance. See(Resisting Arrest under state law 18 Pa.C.S.A. 5104).

Officer Williams claims to the Trial Judge and Jurors that Mr.Byrd created a substantial risk to a quarter centimeter of his left index finger, on November 25, 1992. But, When Officer Williams went to Metro Health Center his Chief Complaint was left hand index finger. See Appendix H. Officer Williams lies about being struck in the face, nose, lip, because the follow-up, R.N. L.P.N. Nurse never advise Officer Williams about Sprins, Severe Bruises, Head Injury, Eye, Ear, Nose nor Mouth. When Officer Williams left the Hospital he was never prescribed Aspirin, Ibuprofen, or Tylenol for Sprains, or Bruises in which he told the Jurors that Mr.Byrd "Assualt him" No Doctor show-up to testify about Officer Williams condition on November 25, 1992.

Mr.Byrd was Acquitted from the testimony of Mr.Zanni, in which Byrd does claim that he was at his Apartment door yelling for help, but the Prosecution try using Mr.Zanni testimony to establish that Officer Petris spoken to Mr.Zanni, after he left his Apartment was when Officer Petris heard a shot fired, but Mr. David Zanni testify that Mr.Byrd was breaking down his door at 1:20am in the morning.

Trial
Vogel to Officer Petris Page 100

Q. Okay. What did you do after that, Officer Petris?
A. I heard a transmission say, "He's running east toward Mrytle," so I began to take my dog toward Mrytle street on 8th street, at which time I heard a gunshot. I didn't know where the shot came from or anything like that, but I proceeded toward Myrtle. And as I crossed Myrtle, maybe went in a couple house on 8th street in a parking lot where I observed the suspect in custody with numerous Officers over him.

Q. Okay. And this gunshot that you heard, was that the only gunshot that you heard during the course of the evening?
A. Yes.
Q. That was definitely after you had spoken to Mr.Zanni about the man having broken into his apartment?
A. Yes.

Trial
Vogel to Mr.David Zanni Page 78

Q. Okay. Could you tell me about what time this might have been?
A. Between 1:15am and 1:30am, approximately, in the morning.

In this case, it would have been impossible for Officer Petris to have claim that he heard a shot after speaking to Mr.Zanni, because Officer William s claims to have shot Mr.Byrd at 1:10am (See Appendix H), and Mr.Zanni claims that Mr.Byrd was at his Apartment until 1:25am, in which Petitioner makes the claim under 42 U.S.C.§ 1983 that he was at Mr.Zanni Apartment door asking for help from Mr.Zanni and telling Mr.Zanni that he was shot. The Prosecution Not only knew this type of testimony by Officer Petris to be false, but the Prosecution knew that Mr.Byrd filed a 42 U.S.C. § 1983, claim a Fourth Amendment violation for using perjured testimony, and the charge of aggravated assault, in order to obtain a conviction. Petitioner had a "Eye" Witness who saw the Erie Police Department inflict severe pain on him and testify that Mr.Zanni lie under Oath by telling the Jurors that Mr.Byrd did not tell him that he was shot on the night of November 25, 1992. See N.T. Direct Defense Page 149-154 and 91.

The Prosecution other witness, Ms.Fisher told the Jurors that Mr.Byrd spend from 12:45am for about 20 minutes in her Apartment, which the total time is 1:05am, when Officers Petris, Dregalla and Durrell arrive at her Apartment, when they all claim Mr.Byrd dive-out -of -her bedroom Window. But the testimony of the three Officers never apprehend Mr.Byrd. Officer Petris told the Jurors that when enter into Ms.Fisher Apartment he Never saw anyone. Officer Dregalla claims to have saw and chase Mr.Byrd, but loss sight of him. Officer Durrell heard Officer Dregalla "Yell-out Stop Police", and claims to the Jurors that Mr.Byrd ran right buy him with a curtain completely wrapped

around his face and he to claims to have loss sight too. There was no other testimony, to have claim that Mr.Byrd had World Class Speed, in order for these Officers to have claim Byrd ran pass them. The time is 1:06am, Officer Kuhn, Officer Williams Partner, claims to have had a Conversation, with Mr.By-ry, but Officer Kuhn never identifys her self as an Officer, and the when asks whether she claims to have identify her self as an Officer. She said "Yes". Officer Kuhn also, claims to have told the Jurors that she loss sight only because "Car 107 Officers Howe & Rouse got in her view, when she claim that Mr.Byrd was run-away from her when she identify her as a Police Officer, but from about 15 feet. The time is 1:08am Officer Kuhn claims that she saw Office r Williams and Mr.Byrd Struggling in the middle of the street and Mr.Byrd reach and grabb her partner Ruger 9mm hand gun. The time is 1:10am, Officer Kuhn told the Jurors that Officer Howe & Williams chase Mr.Byrd and that she saw her partner firer one shot and "Yelled for the suspect to Stop Police".

The time is 1:12am, Officer Kuhn told the Jurors that Officers Williams and Howe caught Mr.Byrd in a Parking lot. The time is 1:19am according to Officer Byrne, who claims to have read Mr.Byrd his Miranda Rights.How could Officers Williams, Kuhn, Howe, Rouse and Byrne testimony to the Jurors be true when Prosecution Star Witness Mr.David Zanni told the Court and Jurors that at 1:20am, Mr.Byrd was breaking down his door? Officer Rouse never testify at trial whether or not his partner was telling the truth.The Prosecution knowingly and intelligently, mislead the Jurors, because Officer Williams claims that he and Mr.Byrd fought twice.(N.T. Page 29 thought 36 Kuhn)(C.Fish-er Page 42+49)(Petris Page 96)(Dregalla Page 5-6)(Durrell Page109)(Howe Page 72)(Byrne Page 85-86).

What is importantly is the Prosecution first Witness Ms.Fisher, who claim s that Petitioner broken into her Apartment, but there was "No evidence to support her claim according to Detective Dedionisio, who photograph everything that Ms.Fisher pointed out in her Apartment said Byrd touch and the Detective

identify evidence, develop fingerprints, looked for blood outside and inside window screen wear Petitioner run out of and dusted the back door for prints and "Didn't develop any prints of Comparison Value", at 807 Chestnut Apartment. (N.T. Pages 105+108). The second most important testimony by Ms.Fisher is her testimony that she was under the influence of a Drug called Haldol.

Trial/Cross
Moore to Ms.Fisher Page 53

Q. Miss. Fisher, you were in bed when you heard this sound out at your living room window?
A. Yes
Q. Do you recall what time you went to bed?
A. Oh, about 12:30am
Q. Did you take any sleeping pills or Medication before you went to bed?
A. Yes.
Q. What did you take?
A. I took my Medication, I think it was Haldol.
Q. Haldol. That's for sleeping?
A. No, for something else.
Q. About what time had you taken that?
A. about nine.

If, Ms.Fisher had taken Haldol at nine she was sleep, because Haldol is the first Butyrophenone series of Major Tanquilizers. And has an Exception of duration action, long acting perenteral AntiPsychotic Drug intended for use in Management of patients requiring prolonged perenteral Antipsychotic Therapy (e.g., Patients with Chronic Schizophrenia). This may be the reason why, Ms.Fisher told Prosecution and Defense Counselors, when asked whether or not could she tell the race of the man or whether the person was Man or Woman, in which Ms.Fisher claim that:

Trial
Vogel to Ms.Fisher Page 44

Q. Could you tell the race of the man?
A. Yeah.
Q. What was that?
A. Black.
Q. Okay. Anything else you can remember about how he looked when you got to the door?
A. No.

Trial/Cross
Moore to Ms.Fisher Page 51 & 56

Q. Dark Jacket, but could you tell if the person was a Man or Woman?
A. No.

Q. Could you tell if the person was Black or White?
A. No.
Q. Did the person appear to be doing anything?
A. No.
Q. Was he walking or standing still?
A. Just standing still.

The Probable Cause, in which the Prosecution used to claim that Mr.Byrd committed these crimes was based upon a Search Warrant#G 16174 by Det.Sgt. Dipaolo, that Mr.Byrd possess Officer Williams Ruger 9mm Handgun and that there was blood on it from Mr.Byrd. Also, Ms.Fisher told Det.Sgt. Dipaolo that Mr.Byrd had a Blue Sweater on in which Mr.Zanni concurring. But the testimony from Ms.Fisher is different at trial:

Trial
Vogel to Ms.Fisher Page 44

Q. Could you tell anything about the man's appearance or description?
A. He was wearing blue Jeans and Dark shirt.

This Court has said that "When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a New Trial irrespective of good faith or bad faith of the Prosecution. See Giglio v. United States, 405 U.S. 150 92 S.CT. 766 (1972). Other reliability of given testimony, is Officer Fetterman who claims to pick up Ms.Fisher at during Second shift hours from 3pm to 11pm. at a Suppression Hearing, then changes his story at trial and claims third shift 11:00pm to seven 7:00am.

Another, Officer claims that he responded to that particular call around Midnight.

Trial
Vogel to Officer Zawistowski Page 92-93

Q. Do you know when you would have responded to that particular call?
A. It was approximately Midnight, maybe a few minutes before Midnight.
Q. And what was the nature of the call as you knew it?
A. A break-in, I believe, was in progress, and that's why I responded to that call.

Trial
Vogel to Officer Petris Page 94

Q. Did you have an occasion to recieve a call to the area of 307 807 Chestnut Street?

A. Yes. As I recall, car 104 was dispatched to 807 Chestnut, I believe Apartment number three(3), for possible domestic dispute.

Officer Zawistowski could not have possibly heard a call for a break-in when Officer Petris, the first Officer on the seen testify that the call was given as a possible Domestic Dispute.

II. Certiorari should be granted because the Lower Court did not fail or refusal to recognize that Byrd did not sue those he accused of his damages, but the central question presented here is whether that rule applies to a single act that itself neither violates nor commands a violation of Federal Law.

In Board of County Commissioners of Bryan County, Oklahoma v. Brown, 117 S.Ct. 1394 (1997), Justice Souter, with whom Justice Stevens and Justice Breyer join, dissenting states:

> "We held a municipality liable under 42 U.S.C. § 1983 for harm caused by the single act of a policymaking Officer in a matter within his authority but not covered by a policy previously identified. See Pembaur v. Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d. 452 (1989), with this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body-whether or not that body had taken similar action in the past or intended to do so in future, because even a single decision by such a body unquestionably constitutes an act of official government policy". See Owen v. City of independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1988)(City Council passed resolution firing Plaintiff without a pretermination hearing); Newport v. Fact Concerts, Inc., 453 U.S. 247 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)(City Council canceled license permitting concert because of dispute over content of performance).But the Power to establish policy is no more the exclusive province of the legislature at the local level than at the State or National level. Monell's language makes clear that it expressly envisioned other officials "Whose acts or edicts may

fairly be said to represent official policy", Monell, supra, 436 U.S., at 694 98 S.Ct., at 2037-2083, and whose decision therefore may give rise to municipal liability under § 1983.

Trial
Vogel to Officer Williams Page 60-

Q. What did you do after that?
A. The first thing after that I saw Sergeant Robarts at the scene and I handed him my gun and I said, "I fired a shot at guy". The Policy is immediately turn your Weapon over to the nearest Supervisor.
Q. Okay. And you, in fact, did that?
A. Yes, Sir.
Q. And is that standard procedure in a situation where an Officer Fires at an individual?
A. To the best of my knowledge. This the first incident like this I've been involved in.

Once the Prosecution cross-the-thrusthold, by asking Officer Williams whether or not this was a New Procedure, on turing over his Weapon to his Supervisor, Officer Williams represents Official Policy and is liable under Municipal liability § 1983. Because one of the factors in Fourth Amendment balancing test is extent of the intrusion, reasonableness of a seizure depends on not only when a seizure is made, but also how it is carried out. See Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1699-01 (1985).

Trial
Vogel to Officer Williams Page 61

Q. So for you it was a New Procedure?
A. Certainly was.
Q. Okay. And did you, in fact, turn your items over to the Internal Affairs?
A. I turned the weapon over to Lt.Gryncewicz upon my arrival at the station. and when Lt.Strictland of the Internal Affairs arrived at the Station, I truned over the clip and round for Orders of Lt. Gryncewicz.
Q. Were they returned to you?
A. Yes. That was several months later.

Again, the Prosecution cross-the-thrusthold, by asking Officer Williams "So for you it was a New Procedue", because Williams never mentions to the Prosecution nor the trial Court that he told his Supervisor that Mr.Byrd grabbed for his Ruger 9mm handgun and that there was blood on it from Byrd in which the Supervisor would have put the gun in a plastic container or bag

to have it analyze for Fingerprints. There was no good faith immunity for municipality under Federal Civil Rights Statute, 42 U.S.C.A. § 1983. See Garner v. Memphis Police Dept., 710 F.2d 248-249 (1983); Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

The Ruger 9mm handgun not only becomes tainted evidence, but also, Manufacturing Evidence, because Officer Williams never explains, How blood got on this weapon to his Supervisor. After Constitutional violation has been made out, showing of intent to injure is not further prerequistite to recovery under Civil Rights Act; one need not prove motive or evil intent to avail himself of statutory remedy. 42 U.S.C.A. § 1983 Jenkins v. Averett, 424 F.2d 1232-33 (1970); Roberts v. Williams, 456 F.2d 828 (1972), Federal Jurisdiction under civil rights act is established by good faith allegations of complaint and not on the facts as they turn out to be. 42 U.S.C.A. § 1983; Carter v. Carlson, 447 F.2d 361 (1971), If police officer makes arrest without Probable Cause, or uses Excessive Force in making arrest, his action is sufficiently Cloaked with Official Authority to satisfy limitation of statute, which authorizes instuting actions for deprivation of civil rights, to wrongs performed under Color of Law. 42 U.S.C.A. § 1983.

CONCLUSION

As Supreme Court Justice Rehnquist said in United States v. Russell, 411 U.S. 423, 431-32 93 S.Ct. 1637-1643, 36 b.Ed. 366 (1973):

> "We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that Due Process Principles would absolutely bar the government from invoking Judicial processes to obtain a conviction".

Well, I think, in this case the time has come, as Cheif Justice Rehnquist said twenty-five years ago. On November 25, 1992, Darryl Byrd was coming from the SuperMarket, just walking down the street in the City of Erie, when all of sudden the 300 block of west 9th street, in the middle of this block, Mr.Byrd was shot from behind. This surprise Mr.Byrd, and because he did not no were

this shot came from, just like any normal person would dc he ran for help to the door of Mr.David Zanni. Mr.Byrd asks for his help, but Mr.Zanni said no way, get out. Mr.Byrd then walked to the next block over to west 8th street to the 200 block and to rest, when out of the blue, unidentify Erie Police Officers arrested him.

Mr.Byrd was taken to the Erie Police Department Station first. About three hours had pass, before the unidentify Officers had taken Mr.Byrd to the Erie County Prison, where the County Nurse told the Unidentify Officers that "Mr.Byrd would not be accepted at the Erie County Prison, because he has a Gun shot wound and without the written expression consent of a Doctor, that's the only way he can be permitted into the Erie County Facility".

The Unidentify Erie Police Officers took Mr.Byrd to the St.Vincent Medical Hospital, where he was Diagnosis with Sever Trauma and put in Intense Care Unit. 89 day after November 25, 1992, Mr.Byrd was fingerprinted, photograph and process for the charges of November 25, 1992.

When Mr.Byrd appeared for trial on May 18, 1993, to his surprise Mr.Zanni was testifying on the behalf of the Prosecution to establish that Mr.Byrd was "Burglarizing his Apartment and that Mr.Byrd never told him he was shot, was the reason he was at his door asking for help. This was not the reason according to Mr.Byrd's Witness Jerrad A. Sheppard on May 19, 1993, were he told the Jurors that Mr.Zanni was lying, and he told me that he was about to have sex with his girlfriend, when darryl came to the door asking for help, and his girlfriend told him to let Byrd in. Mr.Byrd was acquitted from the testimony of Mr.Zanni and because he was Acquitted, the facts in the Prosecution case are not only a Fourth Amendment violation for using perjured testimony, but obtaining a conviction thought the use of false evidence, know to be such by representative of the state and must fall under the Fourteenth Amendment.

King Solomon, the son of David, once said "To every thing there is

a season, and a time to every purpose under the heaven: A time to cast away stones and a time to gather stones together". See Ecclesiastes Chapter 3 verse 1 and 5. The Jurors on May 20, 1993, were mislead by the facts and the evidence and the fact the Prosecution use an Officer Testimony to establish that Mr.Byrd was not shot when he went to Mr.Zanni Apartment asking for his help. The Prosecution seems to find reading into the Rosewood scrip therapeutic, the way Ms.Fisher could not tell whether the suspect was White or Black Man or Woman.

This Court has the Authority to gather the stones that were throwing on November 25, 1992, and to restore Mr.Byrd's life, liberty with Justices.

WHEREFORE, on the basis of the foregoing, Mr.Darryl Byrd the Petitioner/ respondent, respectfully requests that this Petition for Writ of Certiorari in Opposition be Granted.

Respectfully submitted,

Darryl Byrd, Pro-se
Petitioner

Appendix A2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 and 96-3633

DARRYL BYRD
Appellant

APPENDIX B

v.

CITY OF ERIE POLICE DEPT.;
R.E. WILLIAMS, Police Officer

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

DATED: MAR 31 1998

CLC/cc: DB
GJV

Appendix B2

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3306 & 96-3633

DARRYL BYRD,

Appellant

v.

CITY ERIE POLICE DEPT;
R. E. WILLIAMS, Police Officer

Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. No.: 93-cv-00152E
District Judge: The Honorable Maurice B. Cohill, Jr.

Before:Stapleton, Cowen and Lewis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) December 1, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 16, 1996 and October 10, 1996, be, and the same are hereby reversed and the cause remanded to the said

district court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: MAR 17 1998

Certified as a true copy and issued in lieu of a formal mandate on April 8, 1998.

Teste:

Chief Deputy Clerk, U.S. Court of Appeals
For the Third Circuit.

NOT FOR PUBLICATION

Appendix B2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 and 96-3633

DARRYL BYRD
Appellant

v.

CITY OF ERIE POLICE DEPT;
R.E. WILLIAMS, Police Officer

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civil Action No. 93-cv-00152E)
District Judge: Honorable Maurice B. Cohill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 1, 1997

BEFORE: STAPLETON, COWEN and LEWIS, Circuit Judges

(Opinion Filed FEB 13 1998

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Appellant Darryl Byrd was convicted of unlawful restraint, burglary, aggravated assault, resisting arrest and reckless endangerment. He subsequently filed this civil rights case in which he alleged that the Erie Police Department shot him in the ankle without provocation and then beat him.[1] Byrd advanced claims for excessive force, failure to provide necessary post-arrest medical treatment, use of perjured testimony to obtain a conviction, and an unconstitutional conspiracy between the police and an Erie newspaper to publish the charges against him prior to his conviction.

Defendants moved for judgment on the pleadings, which the magistrate judge recommended granting. Byrd, who was and is currently incarcerated, sought and received an extension of time until September 26, 1995, to file objections to the Report. When he did not file timely objections, the district court granted the motion for judgment on the pleadings by order entered September 29, 1995. Byrd's objections were received the next day.

On October 10, 1995, the district court received Byrd's motion for "stay of judgment." By order entered April 18, 1996, the district court granted the motion for stay of judgment, denied Byrd's objections, and stood by its previous order granting defendants' motion for judgment on the pleadings. Byrd filed a notice of appeal on May 17, 1996. Appellees have filed a motion to dismiss the appeal as untimely.

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[1]Defendants contend that Byrd was fleeing the scene of a robbery and rape and that he had escaped from the police moments earlier.

I.

Byrd's motion to stay the judgment is properly considered as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), or as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Because it was filed within ten days of the entry of the order granting judgment on the pleadings, it tolled the time period for taking an appeal. Fed. R. App. P. 4(a)(4)(E) and (F). Counting from the date of entry of the order denying this post-judgment motion, Byrd's notice of appeal was filed on the 29th day, May 17, 1996, and is therefore timely. Fed. R. App. P. 4(a)(1).

II. The Excessive Force Claim

The magistrate judge found that Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), disposed of Byrd's excessive force and perjured testimony claims. In Heck, the Supreme Court held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 489-90. A district court must dismiss such an action where a successful judgment under § 1983 would "necessarily imply the invalidity of [the] conviction." Id. at 487. The magistrate judge found that Byrd's claims regarding his apprehension and arrest attacked actions whose unlawfulness would necessarily render his convictions invalid. This conclusion is inconsistent with our subsequent decision in Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997). Accordingly, the judgment of the district court must be reversed and this case must be remanded to the

district court for further proceedings on the excessive force claim consistent with our decision in that case.

III.

We agree with the district court that Byrd's perjured testimony claim is barred by Heck.

IV.

The district court dismissed Byrd's conspiracy claim on the ground that it failed to state a claim under federal law. We agree.

V.

Byrd alleges that, after being shot in the ankle and beaten on the head with clubs, he was taken to the police station and subjected to "prolonged interrogation" before being taken to the hospital for medical treatment. The district court acknowledged that Byrd's "allegations sufficiently state a serious medical need in that a lay person could identify that a gun shot wound should be treated by a medical professional." It nevertheless dismissed this claim because Byrd "makes no allegation of a serious injury due specifically to the fact that medical care was delayed, and no allegation that Defendants intentionally ignored his medical need."

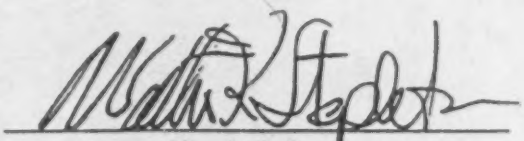
Assuming, as we must for present purposes, the truth of the allegations that Byrd had a gun shot wound and that the interrogation was prolonged, we cannot say Byrd will be unable to prove a set of facts consistent with his complaint on which relief could be granted. Conly v. Gibson, 355 U.S. 41, 45-46 (1957). There was a serious medical need of which a lay person would necessarily have been aware and if there was a prolonged delay in meeting that need for the purpose of interrogation, we believe a fact finder could infer deliberate indifference.[2]

VI.

The judgment of the district court will be reversed, and this case will be remanded for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing not-for-publication opinion.



Circuit Judge

---

[2]The seriousness of any injury specifically attributable to the delay in receiving medical attention will be relevant to the amount of damage to which Byrd may be entitled, but the absence of an allegation of serious injury from the delay is not fatal in a Rule 12(b)(6) context.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 93-152E
	)	
CITY OF ERIE POLICE DEPT., et al.,	)	
	)	
Defendants.	)	

ORDER

AND NOW, to-wit, this 16th day of April, 1996, this Court having received petitioner Darryl Byrd's Motion for Stay of Judgment (Doc. 39) requesting that we review his objections to the magistrate judge's report and recommendation in this action, it is hereby ORDERED, ADJUDGED, and DECREED that said motion be and hereby is GRANTED.

Upon consideration of petitioner's objections IT IS FURTHER ORDERED that our Order dated September 28, 1995 (Doc. 37), adopting the report and recommendations of the magistrate judge, shall stand.

Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
District Judge

cc: Counsel of Record

Darryl Byrd
SCI Rockview
Box A
Bellefonte, PA 16823

AO 72A
(Rev. 8/82)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
v.	:	**C.A. No. 93-152 Erie**
	:	
ERIE POLICE DEPARTMENT, et al,	:	
Defendants	:	

MEMORANDUM ORDER

Plaintiff's civil rights complaint was received by the Clerk of Court on April 30, 1993, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on August 24, 1995, recommended that judgment on the pleadings be granted for Defendants. The parties were allowed ten (10) days from the date of service to file objections. An extension of time to file objections was granted to Plaintiff. Service was made on Plaintiff by delivery to SCI Rockview, where he is incarcerated, and on Defendants. No objections were filed. After de novo review of the pleadings and

documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 28th day of September, 1995; **IT IS HEREBY ORDERED** that Defendant's Motion for judgment on the Pleadings is **GRANTED**. Judgment is entered in favor of Defendants and against Plaintiff.

The report and recommendation of Magistrate Judge Susan Paradise Baxter, dated August 24, 1995, is adopted as the opinion of the Court.

/S/Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
United States Dist. Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge

all parties of record /s/ rw

A P P E N D I X

-E2-

ERIE COUNTY COMMON PLEAS COURT NOTES

OF TESTIMONY OF TRIAL:

DATED MAY 18, 19, 20, 1993:

more credible or more believable? You look at the other evidence.

What does David Zanni say about the man who comes to his door? The man who comes to his door is bleeding from the face and has blood on his hands. Where is the defendant shot? Undisputed, no question about that, one bullet wound on the lower right ankle. That's not going to make you bleed from your hands or your head or your hands. He was shot in the ankle. What's more logical a conclusion? It's more logical that he's bleeding from his face and hands because when he dove through the window at Christine Fisher's smashing it out, that he cut himself in the process.

You also know that every single witness who testified who was in a position to observe -- there were some that obviously weren't, but every single person who testified that was in a position to observe verified the break-in at the Zanni residence occurred several minutes before Mr. Byrd was shot. Mr. Byrd was apprehended almost immediately after being shot. There's absolutely no way on either that anyone could conclude from the evidence presented in this trial that the Zanni incident occurred after Mr. Byrd was shot. That is

just not physically possible from the evidence you've heard.

And you have to base decisions on evidence. You can't speculate. You have to use common sense and apply it to the evidence that's been presented. To base a factual finding on something, there has been to some evidence to base it on. And the evidence is uncontroverted that the Zanni incident occurred several minutes before Mr. Byrd was shot. And, as I said, after Mr. Byrd is shot, he's apprehended almost immediately. And, in fact, he's going in the opposite direction and is nowhere near the Zanni residence, he's down in the 200 block of West 8th from, two blocks away. There's absolutely no way it could have happened in the other order.

So what does that tell you about which witness is more credible? It corroborates Mr. Zanni and his version of the events. When you look at the Commonwealth's evidence as a whole, ladies and gentlemen, there is a whole lot more here than just identification. And it isn't just one identification, it's a whole series of identifications and a whole series of other evidence on top of that.

You've got Christine Fisher, victim of the

Q Okay. And, once again, if you could, for the benefit of the jury, where did you decide to do that, Officer Williams?
A There's several reasons. What we were -- with the information we had, he was involved in an -- in a violent felony, the attempted rape. He had been -- it's alleged that he had broken into a second house during his flight to escape that. Where he was going, it was very likely, you know, he would get lost in the area because he alluded police once already. The area he was going to is a very heavy concentration of apartments, mostly Gannon students, especially a lot of young females in the area. I was very concerned if we lost him and he forced his way into one of those houses, we could have a situation where, you know, somebody would be hurt.
Q And for all of those reasons you decided to fire at him?
A Yes, sir.
Q Did you have anything particular in mind when you decided to fire at Mr. Byrd?
A Just knew that he had to be, you know, taken into custody and stopped. I felt that if we -- if I didn't, I would lose him, I would not be able to stop him.
Q Okay. Did you take aim with your revolver?
A Yes, sir.
Q What did you take aim at?
A I aimed at his lower back and upper leg area.
Q What was your reason for aiming at that area?

APPENDIX E

TRIAL

Car 7 pursued him up over the sidewalk and I moved into position to block him coming down, down Myrtle. I was getting right at the edge, right at the curbline.

Q So the police cruiser was attempting to cut him off in going in one direction?

A Yes.

Q And you were preparing for him to come your way?

A Yes.

Q Okay. Car 107, would that have been Officers Howe and Rouse?

A Yes, sir.

Q And they were both in their vehicle at that time?

A I didn't look to see who was in the vehicle, all I know it was moving and I knew what car it was.

Q Okay. What's the next thing that happens then?

A At this point I had my weapon drawn. I had my gun in my right hand and my flashlight in my left hand. As he's coming towards me and getting closer, I yelled that I was police, freeze.

Q How far away would you say Mr. Byrd was from you when you first yelled, "Police, freeze"?

A It's difficult to say, probably 20 feet. It's difficult to estimate that.

Q And did he respond in any?

A He continued to run directly at me.

Q Did you do or say anything else?
A I repeated myself.
Q Did you say both "police" and "freeze" a second time?
A Yes.
Q Is he getting closer to you as you're saying that?
A By the time I was done yelling a second time, we were right together.
Q Did he respond verbally in any way to your having yelled out a second time?
A No. I got no verbal response.
Q What did he do physically?
A At that point we we were in physical contact. He grabbed my hands. I don't know how I lost my flashlight but he grabbed hold of my gun and was attempting to pull it away.
Q Okay. And you said your gun was in your right hand?
A Yes, sir.
Q And could you tell, did he have one hand or both of his hands on your gun?
A At one point he had both hands. It was a lot of movement of hands at that time. It was back and forth.
Q Okay. Describe what else is going on.
A Okay. At that point, I don't even know where Car 7 was. I had seen him chasing him but my focus was on him so I couldn't say even where he was. At that time there was a struggle between Mr. Byrd and myself to retain control of the weapon and

APPENDIX E

I was trying to get it out of his hands because he was trying to pull it from my hand. I was trying to, you know, get him under control, trying, hopefully, to take him down to the ground at that time.

Q Did you attempt to say anything else to him during this struggle or were you just struggling?

A It was just a struggle. It was taking all my concentration at that point.

Q Were any blows exchanged or struck?

A Yes. After I was able to pull my hand back and get control and get away from him, he struck me to the face.

Q Okay. And do you recall which hand he struck you with?

A No, I never saw which hand he struck me with.

Q Could you tell from the feel of it, it was a closed fist or open hand?

A It seemed like a closed fist. He got me right in the area below the nose on the upper lip, right in the center of the face area.

Q What happened after he struck you?

A At that point it caused my eyes to start watering. He broke way. I was trying, hopefully, to get him down. He broke away and he was able to start running north on Mrytle Street again.

Q Okay. So he's now headed north toward 8th Street?

A Yes, sir.

Q Okay. So it's slightly less than half?
A Yes.
Q Then you talked about doing the enzyme typings. Are you able to do that with all the bloodstains?
A There were bloodstains on some of these items that were too small to do enzyme typing on. Specifically, the curtain that I examined had a very small bloodstain on it. I was only able to determine it was Type O blood in the ABO system. There was not enough blood on this curtain to do enzyme typing on. In addition, there was only a small amount of blood present on the Ruger 9mm. handgun. I was only able to determine it was Type O human blood. Again, there was insufficient quantities of blood on this gun to do enzyme typing.
Q For those two items, the curtain and the weapon, all you can say is that the bloodstains on it were blood Type O?
A That's correct.
Q Now, what about for the remaining items that you've referred to here today, the items on your report that are listed as numbers one, four, five, six, seven, and eight that you've identified as being the sweater, the screen from the window, the two samples from the doorknobs, the samples from the Sea Hawk's cap, and the various items of clothing that were in the large bag?
A Those all had enough blood on them that I was able to do ABO typing to determine they were ABO, Type O blood. And, in

A Yes, sir.
Q What did you do after that?
A The first thing after that I saw Sergeant Robarts at the scene and I handed him my gun and I said, "I fired a shot at the guy." The policy is immediately turn your weapon over to the nearest supervisor.
Q Okay. And you, in fact, did that?
A Yes, sir.
Q Did you have any further involvement in the arrest or processing of Mr. Byrd that evening?
A No. At that point Sergeant Robarts cleared my weapon, checked it out and said, "Put it in your holster and leave it there." I did that. Sergeant Robarts, myself, and I don't know what other officer it was, we left that area and went back onto Myrtle to find where my flashlight and clip had gone.
Q And did you do anything after that?
A We recovered the flashlight and the clip. I believe I took those. He handed those to me. We found the expended round. He said, "Keep them, they're going to want that for the internal affairs investigation." And he said, "Get to your car, get your partner and go into the station."
Q And is that standard procedure in a situation where an officer fires at an individual?
A To the best of my knowledge. This is the first incident like this I've been involved in.

Q Did you see Officer Kuhn at that time?
A I saw her briefly on 9th Street as Mr. Byrd was running eastbound, and then I focused my attention to him and I don't know what happened with her.
Q She did not reach your location before he had fled?
A Not that I saw, no.
Q You received medical treatment that night?
A Yes, sir, I did.
Q That was at the Metro Health Center?
A Yes, sir.
Q Officer, if I told you that the medical reports indicated that you received treatment for a quarter centimeter abrasion on your left index finger, would that be consistent with what you recall?
A Yes, sir.
Q That's the only treatment you received, correct?
A. I informed them of pain in the facial area where I was hit, and they said if it persists, to be treated. But there was no treatment given for that.
Q You suffered no other injuries other than what you described that night?
A Just that and the blood contact with that wound.
MR. MOORE: I have no other questions.
MR. VOGEL: Just a few in redirect. Thank you, Your Honor.

A I believe that was his name.
Q Okay. What did you do after that, Officer Petris?
A Continued searching the yards. We were getting transmissions that somebody spotted a gentleman, suspect running a certain direction. Last -- what I heard, he was going toward 8th Street, so I ended up on 8th Street between Myrtle and Chestnut. I heard a transmission say, "He's running east toward Myrtle," so I began to take my dog toward Mrytle Street on 8th Street, at which time I heard a gunshot. I didn't know where the shot came from or anything like that, but I proceeded toward Myrtle. And as I crossed Myrtle, maybe went in a couple houses on 8th Street in a parking lot where I observed the suspect in custody with numerous officers over him.
Q Okay. And this gunshot that you heard, was that the only gunshot that you heard during the course of the evening?
A Yes.
Q That was definitely after you had spoken to Mr. Zanni about the man having broken into his apartment?
A Yes.
Q About how much after would you say?
A I'd say three minutes.
Q Okay. After you learned that an individual is in custody, what do you do then, Officer Petris?
A I proceeded back to the original address, 807 Chestnut.
Q And what did you do upon arriving back there?

happen to recall that particular evening or morning?
A Yes, sir, I do.
Q What were you doing that evening?
A Oh, I was taking a pizza out of the oven. Just sitting down and watching a little late night show, early morning show, as it were.
Q Did something happen that was unusual?
A Yes.
Q Okay. Could you tell me about what time this might have been?
A Between 1:15 and 1:30, approximately, in the morning.
Q And what was the first thing that caught your attention?
A The sharp thumping noise on my kitchen door.
Q Where were you at in your apartment at the time you heard that noise?
A I was in the adjacent room, the living room of the house.
Q What did you do after you heard this thumping noise?
A Jumped up and ran into the kitchen, turned on the kitchen light and what -- at which time my door was being jarred open.
Q Okay. And could you describe what happened next?
A After about four sharp blows to my door, the center panel of my door split open. The dead bolt held up, the lock held up but the door splintered in the center and the gentleman that was breaking into my house reached through and unlocked my door and entered my house.

THE COURT: You may proceed, Mr. Moore.

MR. MOORE: At this time the defense would call Jerrod Allen Sheppard, Your Honor.

TRIAL APPENDIX E

JERRAD ALLEN SHEPPARD,

having been first duly placed under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q Could you give us your full name.

A Jerrad Allen Sheppard.

Q Mr. Sheppard, I'm going to ask you if you recall November 25th of 1992?

A Yes, I do.

Q That was the day before Thanksgiving last year.

A Yes.

Q Where were you living at that time?

A 428 West 8th Street.
Q And about 1:00 in the morning of that evening, did there occur something unusual near your house?
A Yes. There was about five cop cars, police cars, out in front of my apartment building. They apparently apprehended a black male and they had him on the optical center, which is catty-corner from my apartment, across the street, and I'm on the second floor but I could see right out my window.
Q Did you know that black male?
A Darryl Byrd, yes.
Q And he's present here in court?
A Yes, he is.
Q What did you see happening when you looked out your window?
A What I seen happen, when I looked out my window I seen him sitting on the steps of the optical center and couple policemen standing around him, couple police cars coming down the opposite direction and looked like they were questioning him. And then I seen him lean to one side. And I'm not sure which officer it was, I can't remember that, but I remember he had a night stick in his hand. And he came down and I couldn't actually see it hit him, but I seen the night stick come down and I seen him lean to one side, which would be his right side.
Q Did you see anything else that night?
A I seen them bring down somebody in a cab, which was David

Brimmer.

Q David Zanni?

A Zanni, yeah.

Q Do you know David Zanni?

A Not personally, but I knew him from driving Yellow Cab.

Q Did there ever come a time after that night when you were in a taxicab driven by Mr. Zanni?

A Yes.

Q When was that?

A The next day.

Q How did that happen?

A The next day I was going up to my friend's house on 38th Street, I believe Scott Servidio's house, and I called Yellow Cab and David happened to come down and pick me up. Like I said, I didn't know him personally but I've ridden with him maybe once or twice before. And as we're going up to my friend's house, he asked me, "You guys had some excitement last night." And I was like, "Yeah, there was. Some guy was shot and he was on 8th Street and that's where they were questioning him and whatnot and they had him in handcuffs." He's like, "Oh yeah." He's like, "That's funny, because I had some excitement with the same fellow myself." He said that the same guy came and kicked in his door, put his foot through the door, and he was in there with his lady. And he said he was -- that they were having -- well, that they were about to have sex and he

came and interrupted it. And he came to the door after hearing a loud noise and here it was Darryl standing at the door with his foot in it yelling for help because he was shot. And the lady said, "Let him in." This is what he told me, the lady said, "Let him in."

MR. VOGEL: I'm going to object to the hearsay.

THE COURT: This is hearsay.

MR. MOORE: This is a statement made by Mr. Zanni.

MR. VOGEL: Not the lady.

THE COURT: Now he's referring to what a lady said.

MR. MOORE: It's referring to what Mr. Zanni told him. And I did question Mr. Zanni about if he had any conversation along these lines with anybody else.

THE WITNESS: He told me that.

THE COURT: Wait a minute. You can say what Mr. Zanni told you.

THE WITNESS: This is -- like I said, this is what he told me but also what she had said too. So he said no and he wouldn't let him in. He pushed him back out the door, and there wasn't -- he didn't say there was a scuffle over anything.

TRIAL APPENDIX-E

He said he pushed him out the door and that was about it and he left.

BY MR. MOORE:

Q Does Mr. Zanni tell you that the man told him he had been shot already?

A Yes.

MR. MOORE: I have no other questions.

CROSS-EXAMINATION

BY MR. VOGEL:

Q Does Mr. Zanni tell you where the man was bleeding from?

A No, he did not. He said he had some blood on his hands.

Q He said he had some blood on his hands. Did he tell you about blood on his face?

A No.

Q And when was it that you talked to Mr. Zanni?

A The day after that incident happened.

Q And you're sure he told you the man said something about having been shot?

A Positive.

Q Did you know at that time whether or not anybody had been shot?

A Yeah. that's what people in the neighborhood were saying that night.

Q You heard that from people in the neighborhood that

night?

A Right, that somebody was shot.

MR. VOGEL: I have no further questions, Your Honor.

MR. MOORE: No redirect, Your Honor.

THE COURT: You may step down.

PEDRO PINALES,

having been first duly placed under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q Could you give your name for the record please.

A Pedro Pinales.

Q Mr. Pinales, where do you live?

A I live at 4206 Schaefer Avenue.

Q Are you employed, sir?

A Not at the present time.

Q Do you know Darryl Byrd?

A For about two years, little over two years.

Q Do you know where he lives?

A Before he used to live at 437 -- 347 West 8th Street when I met him and he moved to 702 Ash.

Q And you knew Mr. Byrd in November of last year?

A Yes, I did.

Q And how long did you say you remained there?
A Three to five minutes, tops. We were sitting in front of that building in the police car.
Q Did you see or hear anyone else being asked to identify the man who was sitting there?
A No.
Q Now, the sweater that you say was identified as Exhibit 6, the officer that had driven you there apparently had that in the front seat?
A He had a sweater in the front seat of the police cruiser, that's correct.
Q You hadn't seen it before you mentioned it?
A I had not seen that before. I had mentioned that he had a sweater on. No, I did not see it in the front seat.

MR. MOORE: Could I have just a minute, Your Honor?

THE COURT: Yes.

BY MR. MOORE:

Q Have you ever told anyone that you were, in fact, unable to identify the man that had come in your house?
A No, I did not.
Q Have you ever told anyone the man that came in your house told you he'd been shot?
A Nope.

MR. MOORE: I have no other questions.

A He was a tall, thin black male and he had on dark clothes. I believe he had a dark colored sweater on. I watched him for a second -- few seconds coming toward me and he started to remove his sweater, take his sweater off.

Q He started to take it off?

A Uh-hum.

Q Now, at that point in time, from a radio transmission had you heard any information that the --

A They said there was a tall, thin black male and they thought he had a dark colored sweater on.

Q Did it appear to you the person you were observing fit the description you had heard?

A Yes, it did.

Q What was the next action you took, officer?

A I watched him, and he started taking his sweater off as he got onto 9th Street. And I came from the tree toward him and I said, "Where you coming from?"

Q When you engaged him in this conversation, how far away from him were you?

A I was probably in the middle of the street and he was on 9th Street.

Q Okay. And could you estimate in feet how far you might have been?

A I'm not really good with that. He was in the -- like coming onto the sidewalk from between the two houses, and I was

like in the middle of the street, going toward the curb.
Q Suppose we do it by asking you. can you pick anything out in the courtroom that is approximately the same distance from you as the man was when you saw him?
A Probably from where I am, he was where the doors are.
A These doors up here in front of the court reporter?
A Uh-hum.
Q Okay. What was the lighting condition?
A The street lights were on.
Q And did you have an opportunity to observe the man's face?
A Yes, I did.
Q For how long of a period of time did you have an opportunity to observe him?
A Couple of seconds.
Q Did you believe you'd be able to recognize him if you saw him again?
A Yes.
Q Is the individual you spoke to that evening in the courtroom?
A Yes.
Q Where is he at?
A In the navy blue suit next to the attorney.
MR. VOGEL: May the record indicate she identified the defendant also?

THE COURT: It will indicate.

MR. VOGEL: Thank you.

BY MR. VOGEL:

Q When you spoke to him, what was it that you initially said?

A I said to him, "Hey, where you coming from?"

Q And, as I understand it from your testimony, you're not in uniform: is that correct?

A That's correct.

Q And you have not yet identified yourself as a police officer?

A Correct.

Q Did you have anything in your hands at that point in time?

A I had my police radio.

Q Okay. You did have your police radio?

A Yes.

Q And were you receiving transmissions on it?

A I couldn't say at the time that I was speaking to him if anything had come across.

Q After you asked the man where he was coming from, did he respond to you?

A He removed the sweater and looked at me and said, "What's up?"

Q He took his sweater off?

APPENDIX E

A Yes.
Q Was he still holding it in his hands or did he discard it?
A He had it in his hand.
Q And, if you could, again, could you repeat your response -- I'm sorry, what did he say to you?
A He said, "What's up?"
Q Did you respond then to that?
A No. He started to walk away from me. He started to go east on 9th, and I said, "Stop. I'm a police officer. Put your hands up," and then he just fled.
Q Did you have your service revolver with you?
A Yes, I did.
Q Did you draw it at any point in time?
A Yes, I did.
Q When did you draw it?
A When he started to flee.
Q And had you identified yourself before he started to flee or after?
A Before he started to flee.
Q How far away from you was he when he began to flee then?
A We were both on the sidewalk. He was maybe -- he was maybe five to ten feet.
Q Did you attempt to physically apprehend him at that time? Were you close enough?

A No, I wasn't.
Q What did you do after drawing your revolver and the man started to flee?
A I started to run after him.
Q And in what direction was he headed?
A East on 9th Street.
Q East on 9th Street. And you're on the 300 block as you begin; is that correct?
A Yes.
Q He's headed toward the 200 block?
A Correct.
Q Where does he go as he heads east on 9th Street?
A Well, I had radioed in -- as he started to flee, I radioed in I thought I had a suspect and where he was going. He was going east on 9th Street and he went into the intersection of Myrtle, on 9th and Myrtle.
Q Okay. What happened after he went to that intersection?
A Car 107 came north on Myrtle and they had gotten in front of me.
Q Okay. Now, do you know who was in Car 107 that night?
A I believe it was Officer Rouse and Officer Howe.
Q That be James Rouse and Patrick Howe?
A Correct.
Q And you said that they got in front of you?
A Correct.

Q Where are they at? Where is their vehicle at in relationship to the defendant as you're pursuing him?
A They were right in -- he had run into the intersection and they came north. So he was -- they could see him. He was right in the intersection as he was coming down and he ran over into the -- there was like a little corner, yard or lot, right there with some trees on it.
Q I'm sorry, I didn't men to interrupt. Is this right at the intersection of 9th and Myrtle?
A That would be the northeast corner of 9th and Myrtle.
Q Go ahead, I'm sorry.
A So he ran over that way. And the car, they went up on the curb to stop him, and he turned around and started north to Myrtle.
Q Okay. And was anyone else in the vicinity that you saw?
A Yes.
Q Who else was in the vicinity?
A My partner, Officer Williams.
Q Did you see any other civilians during this time period?
A I don't remember seeing anybody.
Q Where was your partner, Officer Williams, located at?
A He was not in the middle of the block, he was closer -- he was coming south on Myrtle.
Q Okay. Is he on foot at this time?
A Yes.

Q What's the next thing that you saw happen?
A The suspect was running toward Officer Williams. Officer Williams ran up toward him, confronted him, told him he was a police officer, and he had his revolver out.
Q And what happened next?
A I saw Officer Williams and the defendant struggling in the middle of the street. And I saw the defendant grabbing for Officer Williams' gun.
Q You're actually able to see that from where you were at?
A Yes.
Q What's the next thing that you saw, officer?
A I saw Officer Williams fall back.
Q Could you tell if there was any particular cause for that from your vantage point?
A I couldn't say at the time.
Q What's the next thing that you observe then?
A I saw the defendant running north again.
Q And what street is he on at this point in time?
A Myrtle.
Q What's the next thing that you see?
A Officer Williams gave chase along with Officer Howe.
Q Okay. And are you still able to see all of the people that are involved in this chase?
A Yes, yes.
Q What happens next?

A Officer Williams yelled for the defendant to stop. I believe he said, "Freeze." He said he was a police officer. And the defendant kept on running and Officer Williams fired one shot.

Q And could you tell whether or not it struck the defendant?

A I couldn't tell right now. He didn't fall.

Q Did you notice any change in his running?

A No.

Q Okay. What's the next thing that you saw?

A Then he ran between a building, between like -- it's like a parking lot. He ran in that area with Officer Williams, Officer Howe, and myself still giving chase. That would have been east.

Q And when he ran in between the building there, did you eventually lose sight of him?

A I believe for a few seconds I did.

Q During the time that you lost sight of him, did you see any other civilians around?

A No, I didn't.

Q What's the next thing that happened, officer?

A I ran the direction that Officer Howe and Officer Williams and the defendant went. We were behind in a parking lot, it was a brightly lit parking lot, and they had caught the suspect.

Q And could you just describe briefly your apartment, how big it is?
A Just a living room, kitchen, and bedroom and bathroom.
Q Okay. And did something unusual happen?
A I just heard noises at my window.
Q Can you approximate what time this may have been?
A About quarter to one.
Q Quarter to one?
A (Witness nods head)
Q When you say you heard noises, what did it sound like to you?
A I just heard a little noise. I didn't know what it was.
Q Okay. What did you do after you heard the noise?
A I went out to check about it.
Q Did you go outside your apartment?
A No.
Q Where did you go when you said you went to check?
A The living room, that's where they were coming from.
Q Okay. And did you find anything there?
A No.
Q What did you do after that?
A Laid back down.
Q And did anything happen after that?
A Yeah, I heard a knock on the window.
Q Okay. About how much time passed from when you heard the

light. I can see really good in my room when the bathroom light is on.

Q The bathroom light illuminates your bedroom?

A Yes.

Q How long would you say this man was with you in your apartment that night?

A I say about 20, 25 minutes.

Q Now, you said that after you hear him go in the bathroom and after you heard the medicine cabinet open, that after that you hear a knock on your door?

A Yes.

Q And do you hear anything else with this knock?

A No. Then they knocked again and they came in and they said, "Police".

Q After the second time they knocked?

A Yes.

Q What happened after that, what did the man do?

A Well, when he said "police", the guy untied me and I went out and talked to the police, and that's when he jumped through my window.

Q What window was that?

A My bedroom window.

Q Your bedroom window?

A (Witness nods head)

Q Does that face out toward the street?

APPENDIX E

Q Okay. And were you identifying yourself continually as you did this or just once or twice?
A Initially we -- when we first began knocking, we identified ourselves as police, then when the other gentleman opened his door and indicated, I think that was the extent of our identification.
Q Did you eventually get a response from the door you were knocking at?
A Yes, a white female came to the door.
Q And about how long would you say it was from when you first started knocking to when you got the response?
A I would say maybe two, three minutes.
Q Okay. And when she came to the door, did you identify yourself?
A Well, I was in uniform so I didn't say, "I'm the police." She just opened the door and there I was.
Q And what happened after she opened the door?
A She was hysterical. She just screamed, "He's in here, get him." At that point, like I said, a call was given out as a domestic, so I started to walk into the house as she let me in.
Q And did you see anyone else in the residence?
A No, I didn't.
Q Did you hear anything else?
A Well, as I walked into the residence I heard this big crash. As it turned out, what it was was a window breaking.

Q When you say "we", who else is there?
A Officer Petris was there at the same time. He arrived at the same time I did. The upstairs neighbor directed us to the door on the right as your face the door. Officer Petris was knocking at the door. First we weren't receiving any type of response, so I went around to the north side of the building and checked to see if I could look inside the window of the first floor apartment.
Q What happened after that?
A After a minute or so I saw a woman come into the -- appeared to be the kitchen that I was looking into, and she was yelling and she was pointing toward the front of the apartment, which would have been toward the Chestnut Street side, front of the building.
Q What side of the building were you on?
A I was on the north side. There's a sidewalk that goes along the north side of the building, that's where I was.
Q Would you be in the direction she was pointing?
A No. She would be pointing toward the front, which would be west.
Q What did you do or see after that, officer?
A I could hear her yelling something, and I wasn't able to determine what it was, but at the same time I heard a crash and I saw a black male dive through the window which had been the next window toward Chestnut, west of where I was standing. I

saw him dive out the window and land on his back on the sidewalk.

Q How far away were you from this man?

A Maybe 15 feet. The difference of one room.

Q Can you describe his size or what he was wearing, anything like that?

A Well, originally I had thought that he had a dark sweater on but it looked like it had something else over top of that. At first I couldn't tell the size because he immediately got up and started to run, and then I gave foot pursuit after him. He ran -- he wasn't a whole lot bigger than me, not as wide anyways. He ran south on Chestnut.

Q How tall are you, officer?

A I'm about five foot, ten.

Q And you indicated, originally you thought he had something over his sweater. Did something change your mind afterwards?

A Well, I started foot pursuit after him. I was watching him when he originally made the turn onto 9th Street. It wasn't there anymore. Then I wasn't sure if it fell off or he took it off or something like that as he went around the front of the building, but I know when I was chasing him for the better part of the chase -- it was a dark sweater.

Q Okay. Let me just ask you, did you ever go back to the area of 807 Chestnut Street after you left?

Petris and K-5 Officer Dregalla, they were outside their cars at 807.

Q And what did you do when you arrived?

A Well, when I exited the car, I had to find 807. It's dark in this area, and just as I had come up to 807, which was subsequently identified as 807, I heard this loud crash, breaking glass, coming from the rear of 807 Chestnut, and I heard Officer Dregalla yell out, "Stop, police," and an unidentified person ran directly passed me with a curtain -- it was identified later on as a curtain -- over his head, running south on Chestnut, and then west on 9th Street.

Q And how far could you see this individual yourself?

A He almost ran me over.

Q And could you see anything of his face?

A Not a thing. The curtain was completely wrapped around his face. It dropped off as he ran away from me.

Q Okay. Did you then see it drop off?

A Yes.

Q Approximately how far away from the home was it where it dropped off, if you can recall?

A It was dropped curbside, probably eight feet or so from the front of the house.

Q I'll show you, officer, from a bag I previously marked for identification as Commonwealth Exhibit 1, the contents, and ask you if you can identify that?

A Another unit was dispatched. It was the 300 block of West 9th Street and it was a break-in and an attempted rape. The suspect fled the residence and he was in pursuit of the police -- or the police were pursuing him, and we went over to secure the area.

Q And where did you go to?

A We went to 10th and Chestnut and we arrived there approximately about 1:05 in the morning.

Q And did you make any observations upon your arrival to that area?

A We sat in the area there and we were advised over the radio by Officer Kuhn that she was in pursuit of the black male suspect. And she gave a description of black T-shirt or dark colored T-shirt, jeans, and he was running eastbound on 9th Street.

Q Okay. As I understand it, though, when you first arrived to that area, you were stationary in the vicinity of 10th and --

A That's correct. We sat there approximately three minutes until we received the information from Officer Kuhn.

Q Okay. While you were there, you were monitoring radio traffic to wait and see what was happening?

A That's correct.

Q Okay. After you received the additional call from Officer Kuhn, then what did you do?

A At that time we started heading northbound on Chestnut

APPENDIX E

A Yes, I was.
Q Do you recall what unit it was?
A I've been going in Unit 123 for a few years, that's probably it.
Q Were you working alone or with a partner?
A I had a partner.
Q Do you recall who your partner was that evening?
A Officer Kress.
Q Do you recall at any time responding a call in the lower west side of Erie?
A Yes.
Q Approximately what time would you have responded to that area?
A It was right around 1:00 in the morning.
Q And do you recall where you'd been at immediately prior to that?
A No, I don't.
Q Do you remember the nature of the call as far as the information transmitted to you?
A It was several units were at the time pursuing a burglary suspect.
Q Okay. Anything else you can remember about it?
A No, that was --
Q Where did you go, if you can recall?
A Well, we initially went to the 8th and Chestnut area

where the incident had started or was taking place at that time. By the time we had arrived, the suspect had already been placed in custody.

Q Okay. So when you arrived on the scene, there was already an individual in custody; is that correct?

A Yes.

Q And do you recall where the individual was?

A In the 200 block of West 8th Street.

Q So you were not involved in any of the chase or apprehension of the suspect?

A No.

Q What did you do after you arrived at the scene?

A We were the unit that was going to transport him. At approximately 1:19 in the morning, I read the defendant his rights. We then transported him to the station.

Q And when you say "we", was that with your partner?

A Yes, Officer Kress.

Q And what did you do after transporting the suspect to the station?

A At the station we conducted a strip search to look for a bullet wound. He did have one bullet wound to his right ankle area. We also found $8 in his right pants pocket. He had $5 bill and three ones. He also had PA driver's license and some keys. Myself, I tagged the money. I tagged the driver's license, the keys, and several pieces of clothing, which were a

there. I was trying to figure out what exactly I was going to do first. Generally, as a rule, I photograph everything and try to identify evidence, develop fingerprints.

Q And did you, in fact, do that in this case?

A Yes, I did. I took photographs outside of the house, apparently where this individual had jumped out of a window. First floor window on the north side of the house, basically it was. Took photos inside of this bedroom. There were some items on the floor. There was a flashlight, a screwdriver, a belt. I believe there was a jacket and a towel. Those item were brought back and tagged as evidence.

Q Okay. Do you recall if you attempted to see if you could obtain any fingerprints from any of the items recovered?

A Yes. I might add, while I was there the victim had pointed out an area in the bathroom where the individual, she believed, was looking for some prescription drugs or something, and I didn't develop any prints of comparison value there. The screwdriver and the flashlight, I placed them in a super glue tank at work which basically helps develop prints, and the result was there were no prints of comparison value that were present on the items.

Q Okay. So for the scene at 807 Chestnut, the bottom line as far as fingerprints were concerned, you didn't find any of any use; is that right?

A That's correct.

A I had looked for blood outside the window and on the screen and everything, I didn't find any. I believe I dusted the back door for prints and didn't develop any prints back there. Basically, I think that's all I did.

Q What did you do next after that?

A At that time, while I was at the residence, Officer Dregalla was standing by a scene that he was securing until I got there. It was 826 Chestnut. A little bit up the block on the opposite side of the street. He related that he had -- while chasing this individual, apparently he jumped out the window and Officer Dregalla was right there, he spotted him on the porch. I took photographs of the house, of the porch. And on the porch there was a motorcycle and a bunch of storm windows and screens and things of that nature. Upon inspecting one of the screens, there was a considerable amount of blood on it. Removed that from the porch, took a photograph of it, and cut the bloody portion from the screen and tagged it as evidence.

Q What I'm going to show you next, detective, are three photographs that we have previously marked for identification purposes as Commonwealth Exhibits 8, 9, and 10. I'd ask you, first of all, to look at those three photographs and tell us if you can identify the photographs?

A Once again, these are pictures I took and printed.

Q Beginning then with Commonwealth's Exhibit Number 8, could you examine that photograph and describe for the jury what

Q And what room of your apartment is the door located in?
A Living room.
Q Is this a ground floor apartment?
A Yes.
Q What's the first thing that you saw when you opened your door, Christine?
A I seen this guy standing there, and then I went to shut the door, that's what he came in.
Q Okay. Did you recognize the man?
A No.
Q Was it anyone that you knew or had seen before?
A No.
Q Could you tell anything about the man's appearance or description?
A No, he just had a dark shirt and dark pants on.
Q Could you tell the race of the man?
A Yeah.
Q What was that?
A Black.
Q Okay. Anything else you can remember about how he looked when you got to the door?
A No.
Q You say you tried to close the door?
A Yes.
Q What happened when you tried to do that?

Q And, again, you were looking out the window that you thought you heard the knock on?
A Yes.
Q So you're looking out toward the street?
A No, towards the side of the house.
Q Side of the house. Is there a driveway there or --
A No.
Q It's just a yard between you and the next house?
A Just a fence between the two houses.
Q There's a fence between the two houses. And you thought you saw someone on your side of the fence?
A Yes.
Q But you couldn't tell who it was?
A No.
Q And you thought you saw a jacket or a coat?
A Dark jacket.
Q Dark jacket. But could you tell if the person was a man or woman?
A No.
Q Could you tell if the person was black or white?
A No.
Q Did the person appear to be doing anything?
A No.
Q Was he walking or standing still?
A Just standing still.

Q And how long have you had that employment?
A Twenty-seven years.
Q What's your current rank?
A Patrolman.
Q And in November of last year, would you have also been a patrolman for the police department?
A Yes.
Q I want to specifically take your attention to the early morning hours of November 25th of last year. Would you have been working at that time?
A Yes, I was.
Q Do you recall what shift you would have been working?
A Third shift.
Q And what was your assignment that particular evening?
A I was driving a police cruiser by myself that evening.
Q Okay. And did you have any particular section of the city that you were patrolling?
A I don't recall what my assigned district was, just offhand.
Q Did there come a point in time you responded to a call in the lower west side of town?
A Yes.
Q Do you know when you would have responded to that particular call?
A It was approximately midnight, maybe a few minutes before

midnight.
Q And what was the nature of the call as you knew it?
A A break-in, I believe, was in progress, and that's why I responded to that call.
Q And where did you go when you first responded to that area?
A I went to 9th and Myrtle, to the northwest corner of 9th and Myrtle.
Q Okay. And did you make any observations upon your arrival there?
A Not initially. I just covered that corner because the information that I got while traveling there was that a suspect was somewhere in the block, I believe Myrtle to Chestnut, 8th to 9th.
Q Were you monitoring the radio transmission?
A Yes.
Q Okay. What did you do or observe next, officer?
A I stayed at 9th and Myrtle for a few minutes in case the individual would come out onto the Mrytle Street side. And after a few minutes there we had information that this individual was in a house about a half a block west of my position within that 8th to 9th, Myrtle to Chestnut block. So I moved down into the middle of the block and helped other officers search the area there.
Q Okay. And did you, yourself, ever see any sign of a

A Yes, I was. I was working third shift, which is 10:30 at night to 6:30 in the morning.
Q And would you have been working alone?
A With my partner, the dog.
Q As a K-9 officer, your partner is a K-9?
A God forbid I forget to mention him.
Q Did you have any specific assignment or duty that particular shift?
A My job entails just patrolling the city limits, answering calls and backing up other units.
Q Did you have an occasion to receive a call to the area of 307 -- 807 Chestnut Street?
A Yes. As I recall, Car 104 was dispatched to 807 Chestnut, I believe apartment number three, for possible domestic dispute. I decided -- Car 104 was working alone, I decided to back him up.
Q Do you know who was in Car 104?
A I believe it was Officer Durrell.
Q So you decided to go to that scene also?
A Yes, I was in the neighborhood, I was close by. As a matter of fact, I got there before Car 4 did.
Q You actually were the first police unit to arrive at that scene?
A Yes, myself and Officer Dregalla, who also has a dog, arrived about the same time.

MR. CAREY: No redirect.

THE COURT: You may step down.

MR. CAREY: One other witness. We call Officer Fetterman.

LESTER FETTERMAN

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAREY:

Q Would you please tell us what your name is.

A Lester Fetterman.

Q What's your occupation?

A I'm a patrolman with the City of Erie Police.

Q How long have you been employed as a patrolman?

A Approximately four and a half years.

Q All right. So you were employed in this capacity in November of '92, correct?

A Yes, I was.

Q Were you working on the 15th of November?

A Yes.

Q Do you remember what shift or hours?

A Yes, I believe it was second shift, I was working from three to eleven.

Q Okay. Did you have an opportunity to respond to a call

A Yes.
Q I want to specifically take your attention, officer, to the early morning hours of November 25th. Do you recall if you were working that particular morning?
A Yes, I was.
Q And what hours would you have been working?
A I was working our third shift, from, I believe, 11:00 until seven in the morning.
Q Okay. And do you recall what your assignment was that particular evening?
A Yeah, I was assigned to a patrol unit, Car 103.
Q Okay. And were you working alone or with a partner?
A I had a partner.
Q Who were you working with?
A I was working with Paul McMahon.
Q Do you have any particular area of the city that was your responsibility that evening?
A Well, that evening we were assigned to the central city, would be like above 12th Street up to 26th. But at the time of this call we were in the station doing a report, so we were close by, that's why we went to assist.
Q You were actually at the Erie Police Station?
A Right.
Q Working on reports from a prior incident?
A Yes.

Q So for you it was a new procedure?
A Certainly was.
Q Okay. And did you, in fact, turn your items over to the internal affairs?
A I turned the weapon over to Lieutenant Gryncewicz upon my arrival at the station. And when Lieutenant Strickland of the internal affairs arrived at the station, I turned over the clip and round per orders of Lieutenant Gryncewicz.
Q Were they returned to you?
A Yes. That was several months later.

MR. VOGEL: That's all the questions I have on direct, Your Honor.

THE COURT: We'll take our morning recess at this time, members of the jury. Please do not discuss the case, we'll be in recess for 15 minutes.

(Whereupon, court recessed at 10:50 a.m. and reconvened at 11:08 a.m.)

THE COURT: Mr. Moore, you may cross-examine.

MR. MOORE: Thank you